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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1318~~ 139

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY
and
THE STATE OF DELAWARE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
The Public Interest Requires That This Court Determine Whether or Not Title 18, Section 1084, of the United States Code Pre-Empts State Regulation of Interstate Telephone Communications To Prevent Communication of Gambling Information in Violation of State Law	7
An Important Question of Whether the Decision of a State Court in a Civil Case Is Res Judicata as to Questions Arising Under a Federal Statute Enacted During the Pendency of the State Proceeding Has Not Been, But Should Be, Decided by a Determination of This Court	20
Conclusion	25

Appendix

Opinion of United States Court of Appeals for the Third Circuit, Dated February 16, 1966, affirming the Order of the United States District Court for the District of Delaware	1a
Opinion of United States District Court for the District of Delaware, Dated April 27, 1965	2a-13a

TABLE OF CASES

Page

Andrews v. *Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966 (D.C.D.C., 1949), 89 F.Supp. 176 (D.C.D.C., 1949) 9, 10

Delaware Sports Service v. *Diamond State Tel. Co.*, 241 F.Supp. 847 (D.C.D.Del., 1965), aff'd *per cur.* 355 F.2d 929 (3rd Cir., 1966) 2

England v. *Louisiana Medical Examiners*, 375 U.S. 411 (1964) 23

Grubb v. *Public Utilities Commission*, 281 U.S. 470 (1930) 22-25

H & R Pub. Co. v. *Illinois Bell*, 26 Ill. Commerce Commission 155 (1946) 9

In re Delaware Sports Service, — Del. —, 196 A.2d 215 (Super. Ct. Del., 1963) 23

In re Delaware Sports Service, — Del. —, 202 A.2d 568 (Supreme Ct. Del., 1963), cert. den. 379 U.S. 965 (1965) 6, 23

Kelly v. *Illinois Bell Tel. Co.*, 210 F.Supp. 456 (D.C. N.D. Ill., E.D., 1962), aff'd 325 F.2d 148 (7th Cir., 1963) 13-16

Oklahoma-Arkansas Tel. Co. v. *Southwestern Bell Tel. Co.*, 45 F.2d 995 (8th Cir., 1930), cert. den. 283 U.S. 822-823 (1931) 8

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 25

Simpson v. *Shepard*, 230 U.S. 352 (1913) 8

Sperry v. *Florida*, 373 U.S. 379 (1963) 8

Stein v. *New York*, 346 U.S. 156 (1953) 21

Telephone News System, Inc. v. *Illinois Bell Tel. Co.*, 210 F.Supp. 471 (D.C.N.D. Ill., E.D., 1962), 220 F.Supp. 621 (D.C.N.D. Ill., E.D., 1963), aff'd *per cur.* 376 U.S. 782 (1964) 10, 13, 18, 19

Vassar v. *Raines*, 274 F.2d 369 (10th Cir., 1959), cert. den. 360 U.S. 936 (1959), 362 U.S. 982 (1960) 22

Western Union Telegraph Co. v. *James*, 162 U.S. 650 (1896) 8

Yager v. *Yager*, 7 Cal. 2d 213, 60 P.2d 422 (Supreme Ct. Calif., 1936) 20

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause, Clause 3, Section 8, Article I of the Constitution of the United States 3, 8

Supremacy Clause, Article VI of the Constitution of the United States 3, 8

18 U.S.C. Section 1084(d) 2, 3, 6-10, 12-21, 25

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331(a) 7

LEGISLATIVE HISTORY

House Report No. 967, 87th Congress, 1st Session (1961) 10

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No.

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,
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THE DIAMOND STATE TELEPHONE COMPANY
and
THE STATE OF DELAWARE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of The Supreme Court of the United States:

Delaware Sports Service, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, filed on February 16, 1966, affirming the

Order of the United States District Court for the District of Delaware dated May 13, 1965, denying Petitioner's motion for an injunction and dismissing Petitioner's Complaint praying that defendant The Diamond State Telephone Company be restrained from discontinuing, disconnecting or otherwise terminating telephone facilities, and Petitioner's use thereof.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed February 16, 1966, is reported at 355 F.2d 929 (1966), and is reprinted in the Appendix to this Petition.[2]

The opinion of the United States District Court for the District of Delaware, dated April 27, 1965, is reported at 241 F.Supp. 847 (1965), and is reprinted in the Appendix to this Petition.[3]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[4]

QUESTIONS PRESENTED

1. Does Title 18, Section 1084(d), pre-empt State regulation of interstate telephone communications to prevent communication of gambling information in violation of State law?

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[1] Citations to material included as part of the Appendix to this Petition will be as follows: "App. —".

[2] App. 1a.

[3] App. 2a-13a.

[4] On February 16, 1966, the United States Court of Appeals for the Third Circuit entered the judgment the subject of this Petition. (App. 1a).

2. Is the decision of a State court in a civil case *res judicata* as to questions arising under a Federal statute enacted during the pendency of the State proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause, Section 8, Article I of the Constitution of the United States, provides:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Supremacy Clause, Article VI of the Constitution of the United States, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATUTE INVOLVED

Section 1084(d) of Title 18, United States Code, provides, in pertinent part:

> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the sub-

scriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

STATEMENT OF THE CASE

Petitioner is a partnership of four individuals, namely:[5] Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman.[6] Petitioner is engaged in the receipt by long line telephones, operating interstate, of the name and number of the first horse to finish in certain races at certain tracks.[7] It also receives similar information over commercial radio and television stations, all of which are subject to the control of the Federal Communications Commission.[8] The information received is passed on by Petitioner over the wires of common carriers subject to the jurisdiction of the Federal Communications Commission.[9] Those carriers are Respondent telephone company and

[5] The transcript of record in this case consists of the appendix record on appeal filed in the Court of Appeals below, pursuant to Rule 75(1), Federal Rules of Civil Procedure, and the Proceedings in said Court. Citations to material included as part of said appendix record on appeal will appear as "App. R. —".

[6] App. R. 3a.

[7] App. R. 3a, 93a.

[8] App. R. 3a.

[9] App. R. 4a, 53a, 71a-72a, 73a.

the Bell Telephone Company. The annual volume of Petitioner's business exceeds $10,000.00.[10]

By letter dated October 13, 1959[11] the Delaware Attorney General sent a letter to Respondent telephone company requesting that the company discontinue telephone service to the Petitioner, asserting that he had reasonable grounds to believe Petitioner was engaged in the business of, and receiving compensation for, the dissemination of information in furtherance of gambling and for gambling purposes. Pursuant to and as a result of the Attorney General's letter, Respondent telephone company notified Petitioner, by letter of November 28, 1960,[12] that it would discontinue service, unless Petitioner obtained a ruling by the Delaware Public Service Commission directing the telephone company to provide such service. On December 14, 1960,[13] Petitioner filed a petition with the Public Service Commission praying that the Commission conduct a hearing to determine whether Respondent telephone company had rightful cause to discontinue telephone service to Petitioner. On June 28, 1961,[14] the Commission granted the Delaware Attorney General's motion for leave to intervene in the proceeding, and thereafter, the Attorney General was the dominant opposing party.

Public hearings were conducted in the matter March 12-15, 1962, and on October 10, 1962, and the Delaware Public Service Commission entered its Order[15] per-

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[10] App. R. 4a.

[11] App. R. 36a, 32a-33a.

[12] App. R. 40a, 33a.

[13] App. R. 33a.

[14] App. R. 95a.

[15] App. R. 33a.

mitting Respondent telephone company to discontinue service (but not directing it to) on the grounds that the telephone company had a reasonable basis for believing that Petitioner was using its telephone service to promote illegal activity. There was no determination that Petitioner had committed any crime. This decision was appealed to the Supreme Court of the State of Delaware, affirmed,[16] and a petition for a writ of certiorari to that court was denied by this Court.[17] The issues raised by the appeal were those of due process and freedom of speech.

In September, 1961, the Congress of the United States enacted 18 U.S.C. § 1084(d), which reads as follows:

> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by *it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law,* it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise pro-

[16] App. R. 33a; *In re Delaware Sports Service,* —— Del. ——, 202 A. 2d 568 (1963).

[17] *In re Delaware Sports Service,* Dkt. No. 603, October Term, 1964; 379 U.S. 965 (1965).

vided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored." [Emphasis supplied]

By letters of August 7 and August 14, 1964,[18] the Attorney General of the State of Delaware again requested Respondent telephone company to discontinue service to Petitioner.

Thereupon, Petitioner filed its sworn Complaint in the United States District Court for the District of Delaware, seeking injunctive relief pursuant to 18 U.S.C. § 1084(d); i.e., service could not be discontinued until there was a determination of a violation of law and that otherwise to permit discontinuance of service constituted deprivation of property without due process of law.[19]

REASONS FOR GRANTING THE WRIT

The Public Interest Requires That This Court Determine Whether or Not Title 18, Section 1084, of the United States Code Pre-Empts State Regulation of Interstate Telephone Communications To Prevent Communication of Gambling Information in Violation of State Law.

It is proposed that this Court consider whether enactment of Title 18, Section 1084, of the United States Code, pre-empted the States from interfering with interstate telephone communication service to prevent communication of gambling information, as determined

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[18] App. R. 41a, 48a; 33a-34a.

[19] App. R. 7a-8a; Jurisdiction in the United States District Court for the District of Delaware was based on Petitioner's claim of a Federal right arising under 18 U.S.C. § 1084(d) to operate its business, with an annual volume exceeding the sum of $10,000, free from the complained of interference by the State of Delaware, and therefore fell within the jurisdiction of 28 U.S.C. § 1331(a).

by Congress by virtue of its constitutional power over interstate commerce.

By Article I, Section 8, Clause 3, of the Constitution of the United States the several States of the United States conferred upon Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Telephone messages passing from one state to another have long been held to be interstate commerce. *Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Tel. Co.,* 45 F.2d 995, 1000 (8th Cir., 1930), cert. den. 283 U.S. 822-823 (1931). While decisions of this Court indicate that the exercise of State police power is not wholly preempted from subjects incidentally affecting interstate commerce, *Simpson* v. *Shepard,* 230 U.S. 352, 402 (1913); *Western Union Telegraph Co.* v. *James,* 162 U.S. 650, 656 (1896), it remains firmly established that to the extent Congress has acted pursuant to its power over interstate commerce, State action with regard to that subject is foreclosed under the Supremacy Clause.[20]

The States may, under certain circumstances, have concurrent jurisdiction over subjects, such as telephone communication, within their borders but which are part of commerce between the States. Where Congress, however, passes a law such as 18 U.S.C. § 1084(d) governing a subject previously subject to concurrent State jurisdiction, any prior State law which is inconsistent with such federal enactment is void. *Sperry* v. *Florida,* 373 U.S. 379, 384 (1963).

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[20] Article VI of the Constitution of the United States.

In this case, the common law procedure,[21] if such ever validly existed, employed by the State of Delaware to bring about a termination of Petitioner's interstate telephone service was clearly superceded by Section 1084(d).[22] This common law procedure has long been considered dubious at best. First of all, it has been pointed out that deprivation of telephone service must be based on actual violation of the law, and not mere suspicion. *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966, 968-969 (D.C.D.C., 1949), 89 F. Supp. 176 (D.C.D.C., 1949); *H & R Pub. Co.* v. *Illinois Bell*, 26 Ill. Commerce Commission 155 (1946). In *Andrews, supra,* Judge Alexander Holtzoff pointed out:[23]

> "* * * A public utility may not deprive a member of the public of his rights to service merely because it receives a notice from a law enforcement agency that he is using the service for illegal purposes. A public utility may refuse, and, in fact, must refuse, service if to its knowledge the service is being used for illegal purposes. *This fact must, however, be established.* To confer what would amount to judicial power on a law enforcement officer and to exercise such power ex parte would be violative of due process of law and would deprive members of the public of their legal rights.

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[21] App. R. 75a, 83a, 100a-101a.

[22] Although the District Court asserted that this was a case of the utility's voluntary discontinuance of service (App. 8a), the underlying reality is that no threat to Petitioner's telephone service occurred except upon the initiative and active intervention of the Delaware Attorney General. It is the State of Delaware which has in reality commenced and prosecuted the proceedings to terminate Petitioner's telephone service.

[23] *Andrews, supra,* at 83 F. Supp. 968-969.

> A public utility may not do this, and neither may a regulatory administrative body." [Emphasis supplied]

Thus the common law procedure utilized by Delaware exceeded its constitutional power.

Secondly, it has been observed that aside from the due process questions involved, States are without jurisdiction so to interfere with the telephone service of a member of the public, at least insofar as interstate transmission is concerned. *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 220 F.Supp. 621, 627 (D.C.N.D. Ill., E.D., 1963), aff'd *per cur.* 376 U.S. 782 (1964). The diversity of problems involved in leaving regulation of interstate telephone transmissions to the actions of individual States, where some prohibit off-track betting, and some do not; and many foreign countries do not; and where such transmissions are necessarily made every day by wire services to newspapers and radio broadcasters for legitimate dissemination, indicate the need for exclusive federal regulation of the subject.

It was to settle and resolve these questions, accordingly, that Congress enacted Title 18, Section 1084(d). As stated in House Report No. 967 on this new statute:[24]

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[24] U.S. Code Congressional and Administrative News, 87th Congress, 1st Session, 1961, p. 2631. The more complete legislative history as set out in pertinent part in U.S. Code Congressional and Administrative News, 87th Congress, 1st Session, 1961, pp. 2631-34 is reflected in House Report No. 967:

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities

"The purpose of the bill is * * * to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of * * * gambling information *in interstate and foreign commerce.*" [Emphasis supplied]

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by prohibiting the use of wire communication facilities which *are* or *will be* used for the transmission of bets or wagers and gambling information in interstate and foreign commerce. [Emphasis supplied]

• • •

"The bill does not include within its provisions radio and television stations. The Attorney General is of the opinion, and the Federal Communications Commission agrees, that the Commission has adequate authority under existing law to prevent the transmission of gambling information over the radio and television facilities • • • • "

Attorney General Robert F. Kennedy's letter discussing the proposed legislation stated:

"The purpose of this legislation is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which *are* or *will be* used for the transmission of certain gambling information in interstate and foreign commerce. Radio and television stations have not been included since we believe that the Federal Communications Commission has ample authority to control transmission of gambling information by such facilities.

• • •

"The enclosed proposal would prohibit the leasing, furnishing, or maintaining of wire communication facilities, as defined therein, *with intent that they be used* for the transmission of bets or wagers or information assisting in the placing of bets or wagers, and *would prohibit the use* of such facilities for the transmission of gambling information • • • " [Emphasis supplied]

Obviously, the intent of Congress was to provide a uniform procedure for the termination of interstate wire communication of betting information, applicable in all States, which would be beyond constitutional question as to due process. By its very terms, Section 1084(d) applies to *any interstate* wire communication of gambling information, and therefore all prior State law on the subject, insofar as it is inconsistent with the Federal statute,[25] is superceded.

District Judge Caleb R. Layton concluded, however, that Section 1084(d) had no application whatsoever to Petitioner's case and that it would be treated as a common law type proceeding arising under established Delaware case law rules.[26] Judge Layton stated, therefore, that Respondent telephone company could terminate telephone service furnished Petitioner if the telephone company could prove that it *reasonably believed* the service was being used to aid an illegal purpose, applying the Delaware common law rule.[27] Petitioner has contended nevertheless that Congress, in enacting 18 U.S.C. §1084(d) and therefore pre-empting the unlimited exercise of the power of the State of Delaware over telephone service furnished Petitioner, also established that such telephone service cannot be interrupted absent a prior *prima facie* factual showing that it is being used or will be used for illegal purposes, under a new and controlling Federal Rule.

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[25] App. R. 68a.

[26] App. 8a-10a; App. R. 74a-75a, 83a.

[27] App. 11a. Judge Layton characterized this quantum of proof as *"valid suspicion"*, App. R. 74a, of conduct which *"tended"* to promote illegal activity. App. R. 82a.

To resolve the conflict between these two positions this Court need only note that Section 1084(d) predicates resort to its sanctions on there being a prior factual determination that telephone service "*is being* used or *will be* used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce" and nowhere establishes "reasonable grounds" as a predicate to governmental action. When Respondent telephone company in its November 28, 1960 letter[28] purported to terminate Petitioner's telephone service because it had "reasonable grounds to believe" that such service was being used for illegal purposes, therefore, the company really made a common law proffer of action based on information and belief, absent any *prima facie* factual showing that Federal, State, or local law was being, or would be, violated, which is the governing Federal test.

The summary affirmance of Judge Layton's decision by the United States Court of Appeals for the Third Circuit directly conflicts with the above-quoted express provision of Section 1084(d), but Petitioner moreover submits that the Third Circuit's decision is also inconsistent with the decision of the United States Court of Appeals for the Seventh Circuit in *Kelly* v. *Illinois Bell Telephone Company*, 210 F.Supp. 456, 470 (D.C.N.D. Ill., E.D.,1962), aff'd 325 F.2d 148, 151-152 (7th Cir., 1963), also recognized in *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 210 F.Supp. 471, 475-476 (D.C.N.D.Ill., E.D.,1962), 220 F.Supp. 621, 632 (D.C. N.D.Ill., E.D.,1963), aff'd *per cur.*, 376 U.S. 782 (1964).

In *Kelly, supra,* a proposed termination of interstate telephone and telegraph service was prompted by

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[28] App. R. 40a.

United States Department of Justice letters written in 1962 to the Illinois Bell Telephone Company and the Western Union Company informing them that Department of Justice information revealed that a certain Western Union Sports Ticker furnishing service to Illinois Sports News "is being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law * * * *"[29]

Businessmen plaintiffs using such Ticker brought a suit for a Federal injunction against the discontinuance of such service on the basis that they were not violating Federal, State, or local law and therefore were not within the sanctions of 18 U.S.C. § 1084(d). In the trial proceedings the Department of Justice acknowledged that as an element of its case it had to prove that such telephone and telegraph service was being used illegally to transmit gambling information, and sought to prove this fact through a July 20, 1962 Federal jury verdict against the same plaintiffs. That verdict found them guilty on four counts, and not guilty on eight counts, of a twelve count indictment charging them with sending paraphernalia (consisting of skids of paper and printed copy for their Kentucky publication "Louisville Daily Sports News") used or to be used illegally in gambling. The plaintiffs had stipulated previously in the civil case that they used the telephone and telegraph to transmit information interstate for use in the "Louisville Daily Sports News", and the government reasoned inferentially that if providing tangible materials for inclusion in that publication was illegal then the publication itself was illegal,

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[29] *Kelly, supra,* at 210 F.Supp. 461.

and in turn wire service used to send additional copy for the publication was in aid of an illegal purpose within the proscription of Section 1084(d).

District Judge Hubert L. Will, however, decided that since the July 20, 1962 Federal jury verdict was decided against the plaintiffs on only four of the twelve counts of the indictment involved, the inferences which could be drawn from the *fact* of the verdict were equivocal insofar as they might prove the jury had found as a fact that the telephone and telegraph facilities in question *were used* to transmit gambling information eventually published in the "Louisville Daily Sports News." Judge Will said:[30]

> "In short, the simple fact of the matter is that no conclusion can be drawn with any assurance on the basis of the Indictment and Judge Brooks' Trial Order on *the sole question before this Court*, i.e., whether telephone or telegraph facilities *were used* by plaintiffs for the purpose, in the language of Section 1084(d), 'of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law.'" [Emphasis supplied]

Petitioner points out that because Judge Will turned to the July 20, 1962 jury verdict as a possible source for the *factual determination* on "the sole question" before him shows that he construed the prior requirement for interruption of interstate telephone service, and the application of Section 1084(d), to be that a prior *prima facie* factual showing must be made that such interstate service is being, or will be used, to transmit gambling information in violation of law before

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[30] *Kelly, supra*, at 210 F.Supp. 470.

the sanctions of Section 1084(d) may be imposed on a party such as Petitioner. In affirming Judge Will, the Seventh Circuit also recognized that his search for this prior *prima facie* factual showing was a necessary predicate to the application of Section 1084(d) in the case:[31]

> "To ascertain whether the record before him established by a preponderance of the evidence (this being a civil action) that plaintiffs were using the facilities in question to transmit or receive gambling information in interstate or federal commerce in violation of law so that § 1084(d) became applicable to plaintiffs, the District Judge examined each of the statutes which the government contended *had been violated* * * *" [Emphasis supplied]

The Seventh Circuit then, after concluding that telephone and telegraph service could not be denied to the publishers of "Louisville Daily Sports News", went on to delineate the future factual showing upon which Section 1084(d) sanctions could be imposed upon them:[32]

> "As plaintiffs point out, however, discontinuance of their facilities is not prohibited to defendants if additional *prima facie evidence should be adduced* in the future reflecting *use* of defendants' facilities, in some manner other than that set forth in the Stipulation, the Findings of Fact and the Opinion, which *does show* a violation of Federal, State, or local law." [Emphasis supplied]

Petitioner emphasizes that the Seventh Circuit did not decide that the sanctions of Section 1084(d) would

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[31] *Kelly, supra*, at 325 F. 2d 151-152.

[32] *Kelly, supra*, at 325 F. 2d 152-153.

be applicable if there were "*reasonable grounds to believe*" that the use of the communication facilities in question violated Federal, State, or local law, but rather required that future evidence to be adduced *did show* such violation. This decision is inconsistent with the affirmance by the Third Circuit of District Judge Layton's contrary conclusion discussed above,[33] and this Court should resolve these incompatible views of the necessary evidentiary showing within the pre-emptive jurisdiction of Section 1084(d).[34]

The effects of the decisions of the Seventh and Third Circuits, indicating what are different degrees of initial factual showing in order to invoke sanctions within the jurisdiction of Section 1084(d), because they are different, are bound to cause confusion through differing results in identical cases according as they arise under Federal or State Law. Petitioner points out particularly that the Third Circuit's decision in this case, in effect approving the common law rule applied by Judge Layton, will have a relatively greater impeding effect on telephone and other wire communication service in interstate commerce since States following it, such as Delaware, will be able to exercise too

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[33] App. 11a.

[34] Petitioner recognizes Judge Layton's conclusion in this regard as being *obiter dictum* compared to the decision of the Seventh Circuit in *Kelly, supra,* and therefore the Third Circuit's decision in this case is not technically in conflict with that of the Seventh Circuit. The fact still remains that the *effects* and the substance of the decisions of these two Circuits are inconsistent and raise a question which should be settled by this Court now. If it is not, Federal courts may still feel free hereafter to follow District Judge Layton's rule of decision in this case in other cases initially arising under State law but which are within the jurisdiction of Section 1084(d). App. R. 71a.

liberal a police power based on "reasonable grounds" of belief that such service will be used illegally. Application of the Seventh Circuit's rule in *Kelly, supra,* on the other hand will be based on a relatively stiff requirement of hard *prima facie* proof that service "*is being* used or *will be* used" illegally. This seems a more difficult evidential test for governmental officials to meet with substantial evidence gathered in investigation, and consequently, they are less likely to have a basis upon which to seek termination of interstate telephone or other interstate wire communication service in question. The result of application of this test can be expected to be that interstate commerce will be relatively less likely to be impeded.

Accordingly, this Court should decide the degree to which interstate telephone and other wire communication shall be impeded by the operation of Section 1084(d), whether by strict Seventh Circuit Federal test or liberal Third Circuit common law test, for the two tests are inconsistent in application to interstate commerce. Petitioner for its own part concludes that the express terms of Section 1084(d), and the legislative history thereunder, preclude the formulation of any other rule except one requiring the strict Seventh Circuit *prima facie* evidential showing that an interstate telephone service facility such as that used by Petitioner *is being* used, or *will be* used, illegally to transmit gambling information.[35]

Petitioner also notes that District Judge Hubert L. Will, who reluctantly concurred with the views of

[35] Petitioner submits that this strict rule is consistent with this Court's affirmance in *Telephone News System, Inc., supra,* where Judge Hubert L. Will stated that any action under Section 1084(d) is necessarily predicated on a violation of law by the utility user. 220 F.Supp. 640.

Chief Circuit Judge John S. Hastings and District Judge Julius J. Hoffman in *Telephone News System, Inc., supra,* expressed great concern over the procedural ease with which even the strict Seventh Circuit test under Section 1084(d) can be applied:[36]

> "What concerns me is that, while any action under Title 18 U.S.C. § 1084(d) is *necessarily predicated on a violation of* federal, state or local *criminal law* by the utility user, the proceedings permitted under the statute, because allegedly civil in nature, are far short of what would constitute due process and the sanctions, on the other hand, far more serious than were criminal action taken directly under the same federal, state or local laws against the same utility user. [Emphasis supplied]
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> * * *
>
> "Although we are here called upon to pass only on the application of sec. 1084(d) to the facts of the instant case, it is appropriate, at least in passing, to reflect upon the implications and possible application of the procedure to other situations, for it represents, I believe, a new technique in criminal law enforcement. If the withdrawal of a vital utility service may be accomplished constitutionally by the simply mechanics contemplated by sec. 1084(d) where the facility is allegedly being used to violate federal, state or local criminal laws relating to gambling, it presumably will be equally valid for eliminating alleged violations of other federal, state and local criminal laws, such as federal and state anti-trust laws, those regulating the sale and distribution of securities, the possession and sale of narcotics, income, sales and other tax laws and so on."

Particularly in view of the concern expressed by Judge Will about the potential application of Section

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[36] *Telephone News System, Inc., supra,* at 220 F.Supp. 640, 643.

1084(d), Petitioner submits that this Court should address itself herein to the question of the extent to which telephone and other wire communication in interstate commerce shall be impeded by the types of Federal and State proceedings which took place below.

An Important Question of Whether the Decision of a State Court in a Civil Case Is Res Judicata as to Questions Arising Under a Federal Statute Enacted During the Pendency of the State Proceeding Has Not Been, But Should Be, Decided by a Determination of This Court

District Judge Layton determined below that the questions presented in this case were *res judicata,*[37] but this finding is not supported by the actual circumstances herein.

The issues drawn in the pleadings, and upon which the hearings before the Public Service Commission were held, were based on the law existing at that time. Therefore, the decisions of that Commission and of the affirming Delaware Courts were based on the issues arising under such law, and not those arising under the law applicable subsequent thereto, within the purview of 18 U.S.C. § 1084(d). As the Supreme Court of California said *in banc,* in *Yager* v. *Yager,* 7 Cal.2d 213, 217-218, 60 P.2d 422, 425 (1936):

> "* * * It is a general rule that a party cannot put in issue rights acquired *pendente lite* unless a supplemental pleading is filed, and if such a pleading is not filed he is not foreclosed from asserting such rights in a subsequent action. (*Brown* v. *Brown,* 170 Cal. 1, 147 P. 1168; *Metropolis, etc., Sav. Bank* v. *Barnet,* 165 Cal. 449, 132 P. 833; *People* v. *Holladay,* 68 Cal. 439, 9 P. 655; *People's Sav. Bank*

[37] App. 5a.

v. *Hodgdon,* 64 Cal. 95, 27 P. 938; 2 Freeman on Judgments, 5th ed., p. 1510; 15 Cal. Jur. 165.)"

In this case, no supplemental pleading was filed in any State proceeding to draw in issue the application of the provisions of Section 1084(d) to Petitioner and therefore the rule recognized in *Yager; supra,* permits this Court's consideration of the questions now presented.

The just basis for such a rule is readily ascertainable. To bind parties to what might have been litigated is perfectly sound, but only up to the time the final pleadings define the issues. Once the issues have been cast, it is not equitable to demand that a party be responsible for knowing of, and acting on, changes in statutory law affecting the litigation, indefinitely, until an opinion is handed down. If the rule were otherwise a litigant would be increasingly unable properly to protect his rights arising under statutes becoming effective later in the course of proceedings—particularly on the day judgment were to be entered. This Court should for the first time adopt a Federal civil rule precluding such anomaly.

Moreover, the general rule in criminal cases has been that the decision of a State court on a Federal question is not *res judicata* in a Federal forum unless the State forum was deliberately selected by the complaining party and also the State court decided the Federal question. Even so, this Court noted in *Stein* v. *New York*, 346 U.S. 156, 181 (1953) that while a Federal court will give some weight to the decision of a State court on a Federal question, it is not bound to do so:

"* * * this Court cannot allow itself to be completely bound by state court determination of any

> issue essential to decision of a claim of federal right, else federal law could be frustrated by *distorted fact finding.*" [Emphasis supplied]

This general rule was applied in *Vassar* v. *Raines,* 274 F.2d 369, 371 (10th Cir., 1959), cert. den. 360 U.S. 936 (1959), 362 U.S. 982 (1960), where the appellant had raised the question of his Oklahoma State conviction as an habitual criminal as being violative of Fourteenth Amendment due process and had the matter decided adversely to him by the highest court of that State. Notwithstanding this, appellant was permitted to relitigate this precise question of due process in a Federal Court and, although the question was again decided adversely to him, the Tenth Circuit noted:[38]

> "* * * Since the question presents a question of due process under the Federal Constitution, Amend. 14, the decision of the State Court, while entitled to great weight, is not binding on us in this proceeding."

A different rule has arisen in civil cases in which the litigant has deliberately selected a State court as his forum, to the effect that he may be barred by *res judicata* even as to a federal question. See *Grubb* v. *Public Utilities Commission,* 281 U.S. 470 (1930). Nevertheless, two clear cut exceptions exist to the *Grubb* doctrine: First, the State court must have made a finding as to the Federal question; and Second, the litigant must have willingly selected the State tribunal as his forum.

This Court in *Grubb, supra,* pointed out the first exception by observing from the decision of the Ohio

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[38] *Vassar, supra,* at 274 F. 2d 371.

Supreme Court that it recognized and decided the Federal question involved:[39]

> "* * * while the opinion makes no specific reference to the attack on the constitutional validity of the order, it leaves no doubt that the court regarded that and other objections to the order as untenable, and on that basis affirmed it * * *"

The second exception has been recognized by this Court to apply where the litigant does not "freely and without reservation" submit his question to the State court. *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 419 (1964).

The background of this case clearly shows, however, that both exceptions apply and *res judicata* is inapplicable here. First, the *per curiam* decision of the Supreme Court of Delaware[40] and the decision of the Superior Court of Delaware for New Castle County,[41] disclose no finding or adjudication as to the relevant Federal question and fall short of the finding accepted as adequate by this Court in *Grubb, supra*.

Of more importance is the circumstance that Petitioner was never in substance a deliberate and willing litigant in the State forum and that District Judge Layton's contrary conclusion that Petitioner was is a a distorted finding of fact.[42] How unwilling Petitioner was is reflected in the case background discussed in the Superior Court's opinion:[43]

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[39] *Grubb, supra*, at 281 U.S. 478.

[40] *In re Delaware Sports Service, supra*, 202 A. 2d 568.

[41] *In re Delaware Sports Service*, — Del. —, 196 A. 2d 215 (1963).

[42] App. 5a.

[43] *In re Delaware Sports Service, supra*, at 196 A. 2d 217-218; App. R. 68a.

"For many years the Attorney General's office had attempted to terminate the business of the Delaware Sports Service. After an unsuccessful attempt to terminate this business through the courts in 1949 * * * the Legislature, on the recommendation of the then Attorney General, enacted certain statutes which the Attorney General hoped to use to eliminate businesses of this nature.

* * *

"* * * Thereafter, the Attorney General again requested the Telephone Company to discontinue telephone service to Sports Service. Whereupon, Diamond State notified Sports Service *that it would terminate its telephone service unless Sports Service filed a petition with the Public Service Commission by a certain date.* Sports Service filed a petition with the Public Service Commission seeking to prohibit the telephone company from terminating its services. * * * *" [Emphasis supplied]

In the vernacular, Petitioner was forced into the State forum at gunpoint. Having not freely chosen the State forum, Petitioner should not be bound by the doctrine of *res judicata.*

This Court should look to the substance of this circumstance and establish that in State civil cases giving rise to a Federal question, this Court's rule in *Grubb, supra,* will be inapplicable to bar subsequent Federal court adjudication of the question when the complaining litigant is forced to accept a State forum under the type of administrative process used against Petitioner.

This question merits this Court's immediate determination for in its absence many important Federal questions of the type affecting Petitioner will never be able to reach the Federal court system once the cases involving them arise initially in the States. Such a

result would merely be a reflection of State administrative process sleight-of-hand, as evidenced in this case in Delaware, and not be expressive of this Court's rule of decision in *Grubb, supra,* that Federal court review of Federal questions be preserved unless the one raising them freely seeks and receives a State court determination of them. The Court should act here in the interest of these Federal questions.

CONCLUSION

This Court should decide what accommodation there shall be between the operation of Section 1084(d) and the exercise of State power over telephone service in interstate commerce, for they already are in conflict evidenced by this case.[44]

It is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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[44] *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 241-242 (1959).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15460

DELAWARE SPORTS SERVICE, a partnership, *Appellant*,

v.

THE DIAMOND STATE TELEPHONE COMPANY, a corporation of the State of Delaware,

and

THE STATE OF DELAWARE, *Intervenor*.

Appeal From the United States District Court for the District of Delaware

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Argued January 18, 1966

Before KALODNER, *Chief Judge* and MCLAUGHLIN and GANEY, *Circuit Judges*

Opinion of the Court

(Filed February 16, 1966)

PER CURIAM:

On review of the record we find no error. The Order of the District Court dated May 13, 1965 will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 2901

DELAWARE SPORTS SERVICE, a partnership, *Plaintiff*,

v.

THE DIAMOND STATE TELEPHONE COMPANY, a corporation of the State of Delaware, *Defendant*,

and

THE STATE OF DELAWARE, *Intervenor*.

Opinion

LAYTON, *District Judge*.

Plaintiff is here seeking an injunction to prevent Diamond State Telephone Company (hereafter Diamond State) from terminating telephone service. The background of this extended litigation is as follows:

On November 28, 1960, Diamond State gave notice to Delaware Sports Service (hereafter Delaware Sports) that its telephone service would be terminated[1] because of alleged gambling activities unless it filed a complaint with the Delaware Public Service Commission (hereafter Commission) to have that body decide whether Diamond State would be required to continue providing service to Delaware Sports. Delaware Sports then filed a petition with the Commission seeking to prevent Diamond State from terminating its service. On June 28, 1961, an order was entered grant-

[1] This was the second time that notice of termination of service had been given to Delaware Sports. Prior to 1960, Diamond State had given notice that service would be terminated under 11 Del. Code § 675. The Chancery Court held that the state statute was unconstitutional and enjoined Diamond State from terminating service. Tollin v. Diamond State Tel. Co., 164 A. 2d 254 (1960).

ing the Attorney General of Delaware the right to intervene.

Despite having initiated proceedings, Delaware Sports took the position that the Commission was without jurisdiction since Delaware Sports did all of its business across state lines. After a thorough discussion concluding that the arguments of all parties were erroneous, the Commission correctly held that, in a proper case, it was vested with jurisdiction under 26 Del. Code § 135, to enter an order requiring Diamond State to furnish service to Delaware Sports. In re Delaware Sports Service, PSC Docket No. 328 (Dec. 14, 1961).

In a subsequent opinion on the merits, the Commission found that the telephone service furnished to Delaware Sports was being used in furtherance of an illegal purpose. Accordingly, the Commission held that Diamond State should not be enjoined from discontinuing service to Delaware Sports. In re Delaware Sports Service, PSC Docket No. 328 (Sept. 12, 1962).

Subsequent to reargument before the Commission, Delaware Sports appealed to the Delaware Superior Court. The Superior Court affirmed the Commission's conclusion. In re Delaware Sports Service, 196 A. 2d 215 (1963). In so holding, the court relied solely on the common-law right of a telephone company to discontinue service where that service tends to promote illegal gambling in contravention of public policy. The court expressly indicated that it did not consider whether any sections of the Delaware Code, or a tariff filed by Diamond State indicating that it retained a right to terminate service, would justify Diamond State in discontinuing service to Delaware Sports. Motion for reargument was denied.

The Delaware Supreme Court affirmed per curiam. In re Delaware Sports Service, 202 A. 2d 568 (1964).

Certiorari to the United States Supreme Court was denied. Delaware Sports Service v. Diamond State Tel. Co., 33 USLW 3245 (Jan. 19, 1965).

Delaware Sports' assertion of a right to protection in this court is ill founded. Not only has the plaintiff exhausted its right to litigate the matter, but the contentions it now makes are without merit.

Plaintiff has urged this court to find that the Commission was without jurisdiction, and bases its argument on the Commerce Clause. But, in my judgment, the Commission's exercise of jurisdiction was proper since it had the power to grant such an order as clearly as set forth in 26 Del. Code § 135.[2]

The Commerce Clause is not relevant to the question presented here. A utility company has a duty to provide service for the customers in its territory. This is a duty imposed by state law and the state courts have jurisdiction to enforce it.[3] Any remaining doubts as to state jurisdiction should be removed by the reference in 18 U. S. C. § 1084(d) to proceedings such as that initiated before the Commission.[4]

The plaintiff has argued that jurisdiction in the state proceedings was invalid because it was forced to bring its

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[2] The statute provides:

"The Commission may, after hearing, upon notice, by order in writing, require every utility to furnish safe, adequate and proper service and keep and maintain its property and equipment in such condition as to enable it so to do."

[3] This question is not related to the question of whether the police power can be exercised to compel termination of service.

[4] This statute provides:

"Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court *or in a State or local tribunal or agency*, that such facility should not be discontinued or removed, or should be restored." Title 18 U.S.C. § 1084(d). (Emphasis added.)

action to the state commission. This argument is founded on the letter of notice to the plaintiff advising it that service would be terminated unless it brought such an action. The idea that the state adjudication may not be binding as to federal questions if the plaintiff were forced to litigate its questions in a state forum might have merit in a proper case. Thus, in England v. Louisiana State Board of Medical Examiners, 375 U. S. 411 (1964), the court held that since the plaintiff justifiably believed he had to litigate his federal claims in the state courts, when the action was referred thereto under the doctrine of abstention, he would be allowed to relitigate them in the federal courts. The case at bar does not qualify for this exception. There is no confusion in the law regarding the plaintiff's right to a temporary injunction pending determination of his rights in the forum of his choice. Or stated otherwise, upon receipt of Diamond State's letter of notice threatening to discontinue service, plaintiff had a perfect right to apply for a temporary injunction against the threatened discontinuance pending a determination by a federal court. But plaintiff, nevertheless, elected to proceed before the State Commission. Under such circumstances, plaintiff's contention that it was forced to litigate in the State Courts is unimpressive.

The jurisdictional question disposed of, the conclusion that this Court should not issue an injunction is quite obvious. The right of Delaware Sports to a protective order has been fully and finally litigated in tribunals with jurisdiction. Under the doctrine of *res judicata*, this Court is bound to that result. Grubb v. Public Utilities Commission of Ohio, 281 U. S. 470 (1930). The soundness of this result is apparent since there is

> "no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only counte-

> nance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries."

England v. Louisiana State Board of Medical Examiners, 375 U. S. 411, 419 (1964).[5]

There is a striking similarity between the case at bar and Grubb v. Public Utilities Commission of Ohio, 281 U. S. 470 (1930), in which the Supreme Court believed the conclusion to be so obvious that it decided the case without oral argument. In that case, Grubb applied to the Ohio Public Utilities Commission for a certificate to operate motor buses, solely in interstate commerce, over certain highways of Ohio. The Commission granted the license as to most of the route, but excluded, in the form of a prohibition, a portion of the route requested. Grubb thereon initiated injunctive proceedings in the United States District Court to prevent enforcement of the portion of the order which was unfavorable to him. In the meantime the parties sought a review of the Commission's order by the Ohio Supreme Court. The Ohio Supreme Court was the first to reach a final decision and held that the Commission's order was valid. The three judge district court thereon dismissed the proceedings on the ground that Grubb was barred and estopped from further litigating the same matter. The cases are directly parallel on the facts which were crucial to the Supreme Court's decision: (1) a prior final decision on the merits in the state court; (2) identity of parties in the state and federal proceedings; (3) identity of subject matter in state and federal proceedings.

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[5] The Court finally held that the appellants could relitigate their federal questions in the federal courts. The Court reached this conclusion on the ground that there was such uncertainty in the law that the appellant was justified in believing that he was required to litigate his federal claims in the state courts. The confusion referred to related only to procedure in abstention cases, and is not relevant in the case at bar.

On appeal, the Supreme Court unequivocally held that the final decision of the state court was conclusive in the federal court as *res judicata* on all matters in the suit.

There seems to be some question as to whether plaintiff's arguments as to the effect of 18 USC § 1084(d) were made in the state proceedings. Regardless of whether they were, the plaintiff does not have a right to adjudicate that question in this Court. The *Grubb* case is dispositive: when the parties and the thing presented for adjudication are the same as in the state court proceeding, the fact that certain available arguments were not brought to the attention of the state court does not afford a party the right to bring a suit in the federal courts to assert that right. In so holding the Court relied on the age-old rule against piecemeal litigation. Grubb v. Public Utilities Commission of Ohio, *supra* at 478-79. There is no doubt but that the arguments based on 18 USC § 1084(d) were available to plaintiff during the state proceedings. The Statute was passed before the Commission handed down its opinion on the merits, albeit subsequent to the initiation of the state proceedings. The sweeping scope of the holdings in the *Grubb* case undermine all of plaintiff's arguments that this court should make an independent examination of the merits of this case.

Disposition of this case on the ground of *res judicata* should not give rise to an inference that findings and conclusions in the state proceedings would not withstand review or that a new proceeding in this court would result in a different conclusion. Despite the fact that *res judicata* forecloses this court from granting the relief denied plaintiff in the state proceedings, in an effort to remove the apparent confusion of the plaintiff, a brief consideration of plaintiff's principal arguments will be undertaken.

The main argument of the plaintiff is that even if the Commission and the Delaware Courts had jurisdiction, they cannot "permit discontinuance of service by a common carrier because service violates public policy not a State, Federal or local law as approved by 18 USCA 1084(d)."

Plaintiff's Letter Brief, March 1, 1965, at 7. The main thrust of this argument is that telephone service can be terminated only as provided by 18 USC § 1084(d). There is no foundation for the idea that a telephone company is so limited in its ability to terminate service.

The legal right of a telephone company to terminate service when the company believed that the service was used in furtherance of an illegal purpose[6] has long been firmly established.[7] The denial of any relief in the state

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[6] Plaintiff persists in arguing that 11 Del. Code § 675 cannot be enforced to deprive it of telephone service. But the proceeding at the state level was not a suit by the state to compel Diamond State to discontinue service. Such a suit would have been necessary if Diamond State did not believe that Delaware Sports was wrongfully using its service or if Diamond State had refused to cooperate. The state proceeding was an attempt to prevent Diamond State from terminating service as it has threatened to do.

[7] The opinion of the Delaware Superior Court succinctly and accurately states and applies the well developed common-law principles:

> "Generally, however, a telephone company may take the necessary steps to discontinue such service where it is reasonably satisfied that such service is being utilized by its customer to violate the statutory law against dissemination of racing information . . . or where the use of such telephone service is against public policy, such as in the furtherance of bookmaking, an illegal enterprise in this and other states . . . ." In re Delaware Sports Service, 196 A. 2d 215, 219 (1963).

A similar statement of the law was set forth in Tel. News System, Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621, 632 (N.D. Ill. 1963):

> "It has long been held that the customer's right to service from a public utility is conditioned upon his lawful use of the service. . . . The utility has a right to withdraw service to prevent illegal use of its facilities . . . . The practice in a number of states has long been that the utility discontinues service upon notification by the police that the service is being illegally used . . . ."

The law was clearly stated and applied in Hamilton v. Western Union Telegraph Co., 34 F. Supp. 928, 929-30 (N.D. Ohio 1940) and Tracy v. Southern Bell Telephone & Telegraph Co., 37 F. Supp. 829 (S.D. Fla. 1940).

proceedings was founded on this well developed body of law.

Plaintiff's contention that Congress pre-empted this body of common law by enactment of 18 USC § 1084(d) is wholly erroneous. In the first place, the common law and the statute deal with essentially different subject matters. The common law deals with the issue of when a telephone company *can* terminate service and the statute deals with the question of when a telephone company *must* terminate service.

Furthermore, the conclusion that the common law was pre-empted is inapposite to the purpose of the statute as outlined in the legislative history. A communication to the House of Representatives, from then Attorney General Kennedy, was attached to the proposed bill when it was submitted for consideration to the House. That communication emphasized the desirability of such legislation as a means of suppressing organized gambling *by depriving bookmakers of much needed communication facilities.* House Report No. 967, 87th Cong., 1st Sess. (1961), in U. S. Code Congressional and Administrative News 2633-34 (1961).

The object of the law is further indicated in the House Report setting out the purpose of the bill:

> "The purpose of the bill is to *assist* the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to *aid* in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce." (Emphasis added.)

Id. at 2631.

Two conclusions relevant to the problem at bar can be drawn from this legislative history. First of all, the

purpose of the legislation was to "aid" the states. Such a purpose is inconsistent with the contention of pre-emption. Secondly, the means of assistance was to be a deprivation of communication facilities to those who would use them in organized gambling activities. Plaintiff's contention would have the effect of impeding the process of deprivation of communication facilities, in that telephone companies would be prevented from voluntarily terminating service.[8] The Act should not be construed to limit the procedure for termination of service to actions initiated by the government.

Clearly, to construe 18 USC § 1084 as providing one sole procedure for the termination of service would tend to undermine the objective underlying the Act. It is my conclusion, then, that 18 USC § 1084 was not intended to preempt the field and provide the exclusive procedure for the termination of service by a utility.

The remaining phase of plaintiff's argument, that there was error in the state proceedings because termination of service must be preceded by the finding of a violation of law, also falls. This contention is at odds with the existing law on two grounds; namely, the relevant consideration is not whether the utility user is in violation of law, but rather

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[8] The purpose of suppressing gambling is accomplished with equal effect whether the phone company voluntarily terminates service or whether termination is accomplished under the force of the statute. The necessity of 18 USC § 1084 has not been apparent in this case because Diamond State believed that the service was being wrongfully used, and voluntarily undertook to terminate service. However, a general reluctance on the part of public utilities to cooperate by discontinuing service is quite understandable: by terminating service of their own volition the company subjects itself to a risk of a damage suit and forecloses itself from the benefits of a lucrative source of income. The statute provides a means of forcing uncooperative or reluctant utilities to terminate service and at the same time removes the risk of a suit for damages from the utility.

the test is whether the service is being used to aid an illegal purpose. Secondly, the law does not require the utility company to prove, as a fact, that the service is used to aid an illegal purpose. The law allows the utility to terminate service if he can prove that it reasonably believes that the service is being so used. The law on both points is well established:

> "[I]t is well settled that a telephone company may refuse, and cannot be compelled, to furnish service which will be used, or which the Telephone Company has *reasonable cause to believe* will be used, *in furtherance* of illegal enterprises."

Tracy v. Southern Bell Telephone & Telegraph Co., 37 F. Supp. 829, 829-30 (S. D. Fla. 1940). (Emphasis added.) See also, Hamilton v. Western Union Telegraph Co., 34 F. Supp. 928 (N. D. Ohio 1940); Rubin v. Pennsylvania Public Utility Commission, 177 A. 2d 128 (Pa. Super. Ct. 1962).

The plaintiff is further remiss in assigning this error to the state proceedings because the facts do not support his argument. The Commission did not deny relief to Delaware Sports merely on the basis of Diamond State's belief. The Commission indicated that the rights would be determined as follows:

> "[S]hould we conclude that Petitioner is using its extensive telephone facilities to forward and promote an illegal activity, we will, with equal force, uphold the utility's proposed action to prevent its lending its facilities to any illegal act." PSC Docket No. 328 at 4-5 (Sept. 12, 1962).

Thereafter, the Commission found as a fact that the service was being used to aid an illegal purpose:

> "Based on the evidence before us, we are constrained to find that Petitioner's service under its present ar-

rangement was being used to aid illegal gambling in several States including, but not limited to New York, New Jersey, Maryland, and Delaware." PSC Docket No. 328 at 18-19 (Sept. 12 1962).

The Delaware Superior Court affirmed the finding at 196 A. 2d 221:

> "A fair reading of all the testimony on which the Commission relied establishes that it was justified in reaching its conclusion that Delaware Sports Service disseminated flash results of horse races primarily for the use of bookmakers."

Furthermore, in so aiding illegal gambling the plaintiff was apparently violating the law.[9] Plaintiff's contention is not only legally erroneous, but is without substance in fact.

Plaintiff has briefly alluded to two other errors or shortcomings which it claims entitle it to litigate its claim in the federal courts. Neither argument has any merit. One of these claims of error is based on the Commission's refusal to exclude all evidence which would be objectionable under normal rules of evidence. The opinion in the Superior Court clearly disposes of the validity of the plaintiff's contention in this regard by holding that an administration commission is allowed to receive evidence which would be excluded under the rules of evidence. But, in any event, the Commission explicitly indicated that in reaching

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[9] 11 Del. Code § 674 provides:

> "No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

However, neither the Commission nor the Superior Court relied on a violation of this statute.

its decision it had not considered evidence which would normally have been excluded under the rules of evidence.

Plaintiff also contends that there was error in the state proceedings because the burden of proof was placed on Delaware Sports. Once again, the opinion of the Superior Court is dispositive of the plaintiff's contention:

> "Although the Attorney General claimed petitioner had a burden of proof, he proceeded throughout the hearing on the assumption that he and Diamond had the burden. And even though the Opinion of the Commission expressed the belief that petitioner had the burden, nevertheless, it found this issue moot and decided the case on the assumption that petitioner did not have the burden." In re Delaware Sports, 196 A. 2d 215, 233 (1963).

Plaintiff's motion for an injunction is herewith denied and the case is dismissed.

Wilmington, Delaware,

Dated: April 27, 1965.

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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1946~~. 139

DELAWARE SPORTS SERVICE, a Delaware partnership comprised of Albert J. Tollin, Blanche C. Tollin, Shirley T. Ingram and Frances Freezman,

Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

and

THE STATE OF DELAWARE,

Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

	Page
CONSTITUTIONAL QUESTIONS INVOLVED	1
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	4
I. There Are No Special or Important Reasons Why Certiorari Should Be Granted	4
A. The Third Circuit Court of Appeals Did Not Render a Decision in Conflict With a Decision of Any Other Court of Appeals on the Same Matter	4
B. The Third Circuit Court of Appeals Has Not Decided Any Question of Federal Law of Sufficient Importance to Be Decided by This Court	5
1. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That 18 U. S. C. A. § 1084(d) Did Not Pre-Empt a State's Right to Regulate Public Utilities Operating Within Its Borders	5
2. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That the Decision of the Supreme Court of Delaware Was Res Judicata as to Matters Decided in the State Action	7
C. The Third Circuit Court of Appeals Has Not Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court	8
CONCLUSION	9

TABLE OF CASES.

	Page
Grubb v. Public Utilities Commission of Ohio, 281 U. S. 470 (1930)	8
Kelly v. Illinois Bell Telephone Company, 210 F. Supp. 456 (N. D. Ill., 1962), aff'd 325 F. 2d 148 (7 Cir., 1963)	4

CONSTITUTIONAL AND STATUTORY PROVISIONS.

	Page
Constitution of the State of Delaware, Article II, Section 17	1, 5
11 Delaware Code, Section 674	2, 5
11 Delaware Code, Section 677	5
26 Delaware Code, Section 135	5
18 U. S. C. Section 1084	3
18 U. S. C. Section 1084(d)	4, 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1318.

DELAWARE SPORTS SERVICE, A DELAWARE PARTNERSHIP COMPRISED OF ALBERT J. TOLLIN, BLANCHE C. TOLLIN, SHIRLEY T. INGRAM AND FRANCES FREEZMAN,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY

AND

THE STATE OF DELAWARE,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE DIAMOND STATE TELEPHONE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

CONSTITUTIONAL QUESTIONS INVOLVED.

In addition to the constitutional provisions cited in the petition, this case involves Article II, Section 17 of the Constitution of the State of Delaware, as follows:

> "Section 17. Lotteries. The sale of Lottery Tickets, pool selling and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

STATUTES INVOLVED.

In addition to the statute cited in the petition, this case involves the following sections of the Delaware Code:

Title 11, Section 674:

"No person shall engage in the business of, or receive compensation in any form or measure for the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Title 11, Section 677:

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Title 26, Section 135:

The Commission may, after hearing, upon notice, by order in writing, require every utility to furnish, safe, adequate and proper service and keep and maintain its property and equipment in such condition as to enable it so to do."

COUNTERSTATEMENT OF THE CASE.

This respondent, The Diamond State Telephone Company (hereinafter "Diamond State"), believes that the petitioner's Statement of the Case should be explained and expanded in the following respects.[1]

Petitioner's business is not all in interstate commerce; some is intrastate.[2]

Petitioner filed an action in the Court of Chancery of the State of Delaware on October 22, 1959, seeking to enjoin Diamond State from terminating its service.[3] It was after the Chancery Court's opinion declining to exercise jurisdiction that petitioner initiated proceedings before the Delaware Public Service Commission on December 14, 1960.

The issues raised by the appeals in the Delaware courts and to this Court by petition for a writ of certiorari to the Supreme Court of Delaware included the issue of the effect of 18 U. S. C. A. § 1084 on those proceedings.[4]

Petitioner has stated in at least one context that it does not contend that 18 U. S. C. A. § 1084 ". . . confers exclusive jurisdiction on the Federal Courts."[5]

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1. Respondent's citations will be identical in form to those used by petitioner. Thus, "App. —" will be to the pages of the appendix to the petition, and "App. R. —" to the appendix record on appeal.
2. App. R. 68a.
3. App. R. 32a.
4. App. R. 90a.
5. App. R. 68a.

ARGUMENT.

I. There Are No Special or Important Reasons Why Certiorari Should Be Granted.

A. The Third Circuit Court of Appeals Did Not Render a Decision in Conflict With a Decision of Any Other Court of Appeals on the Same Matter.

Petitioner argues that the affirmance by the Court of Appeals of the District Court's decision in this case is in conflict with the decision of the Seventh Circuit Court of Appeals in *Kelly v. Illinois Bell Telephone Company,* 210 F. Supp. 456 (N. D. Ill., 1962), aff'd 325 F. 2d 148 (7 Cir., 1963). The decisions in these cases are entirely compatible because factually they are entirely different. In this case the District Court decided: (1) 18 U. S. C. A. § 1084(d) does not pre-empt state action in the field of termination of telephone service; (2) respondents were not acting pursuant to 18 U. S. C. A. § 1084(d) but pursuant to common law; (3) the state proceedings were res judicata as to the matters decided there.

In *Kelly* we have an entirely different situation. The United States Department of Justice acted specifically pursuant to 18 U. S. C. A. § 1084(d) and the Court of Appeals was concerned with whether or not any federal or state law had been violated. That decision has nothing to say about preemption or the termination of telephone facilities pursuant to well established common law procedure. The District Court here decided that Section 1084(d) has nothing to do with the case other than to allow by its very language proceedings of the type involved in the Delaware state courts. The Court of Appeals decision in *Kelly* was con-

cerned exclusively with Section 1084(d). Clearly, the two decisions have nothing in conflict.

B. The Third Circuit Court of Appeals Has Not Decided Any Question of Federal Law of Sufficient Importance to Be Decided by This Court.

1. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That 18 U. S. C. A. § 1084(d) Did Not Pre-Empt a State's Right to Regulate Public Utilities Operating Within Its Borders.

Diamond State has a duty to provide service to those in its territory who ask for such service. The Delaware Public Service Commission is given jurisdiction to enforce this duty by 26 Del. Code § 135:

> "The Commission may, after hearing, upon notice, by order in writing, require every utility to furnish safe, adequate and proper service. . . ."

The Constitution of the State of Delaware provides in Article II, Section 17:

> "Lotteries. The sale of Lottery Tickets, pool selling, and all other forms of gambling are prohibited in this State; except wagering or betting on races at race tracks by the use of pari-mutuel machines or totalizators in connection therewith.
>
> "The General Assembly shall enforce this Section by appropriate legislation."

The General Assembly has obeyed the constitutional mandate by enacting, *inter alia*, Title 11, Section 674 and 677:

> "No person shall engage in the business of, or receive compensation in any form or measure for, the

dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires or by means of a call service."

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Both the Delaware Public Service Commission and the Delaware Superior Court found that petitioner was using Diamond State's service to aid an illegal purpose.[6] The District Court decided that Diamond State had the right to terminate service under these circumstances, and that this right was based on well established common law principles.[7] The District Court then went on to decide that 18 U. S. C. A. § 1084(d) did not pre-empt this common law area but, on the contrary, was clearly intended to be an aid and supplement to such state procedures.[8]

Diamond State respectfully refers this Court to the decision of the District Court and to the language of Section 1084(d), and respectfully suggests that both establish dispositively and unambiguously that Section 1084(d) is in aid of, and most clearly does not pre-empt, such common law procedure. Especially compelling is the last sentence of Section 1084(d):

"Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

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6. App. 11a-12a.
7. App. 8a.
8. App. 9a.

This question was correctly decided by the District Court and affirmed by the Third Circuit Court of Appeals and is not of sufficient importance to be reconsidered by this Court.

2. The District Court Decided, and the Third Circuit Court of Appeals Affirmed, That the Decision of the Supreme Court of Delaware Was Res Judicata as to Matters Decided in the State Action.

The fallacy of petitioner's argument on this point is that it assumes that Section 1084(d) pre-empts any proceedings taken in the state tribunals. We have already noted that the District Court and the Court of Appeals have decided that Diamond State was entitled to and did rely on its common law right to discontinue its service where that service is being used to further illegal acts. The only question which might not have been decided in the state proceedings was whether Section 1084(d) pre-empted such common law proceedings. If that question was not res judicata, nevertheless the District Court did decide it in favor of respondents. The District Court stated that there was "some question as to whether plaintiff's arguments as to the effect of 18 USC 1084(d) were made in the state proceedings."[9] Presumably the District Court had in mind the statement by counsel for petitioner that these arguments were made in the Supreme Court of Delaware.[10]

In any event, there is no question here of the adjudicated status of questions arising under a federal statute enacted during the pendency of the state proceeding. The District Court specifically held that Section 1084(d) had nothing to do with the state proceedings. What is res judicata, as held by the District Court, is that petitioner is

9. App. 7a.

10. App. R. 90a.

not entitled to a protecive order because that identical issue between the identical parties—whether petitioner is entitled to a protective order enjoining Diamond State from exercising its common law right to discontinue service—was finally decided on the merits in the state court. *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470 (1930).

As to petitioner's argument that it was forced into the state tribunal, Diamond State respectfully relies on the clear and realistic disposition of that argument by the District Court.[11]

There is no question to be decided by this Court as to whether or not issues arising under a federal statute enacted during pendency of the state proceeding are res judicata.

C. The Third Circuit Court of Appeals Has Not Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

The Court of Appeals, in affirming the District Court, relied on the case of *Grubb v. Public Utilities Commission of Ohio, supra.* To the extent that the decision of the District Court on the res judicata issue might be a decision of a federal question, such decision, as pointed out by the District Court,[12] is on all fours with the decision of this Court in the *Grubb* case. Petitioner states that the decisions of the Delaware courts "disclose no finding or adjudication as to the relevant federal question." The fact is that the *only* question which might not have been decided by the Delaware courts was that of pre-emption, and that question was correctly decided by the courts below.

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11. App. 4a-5a.
12. App. 5a-6a.

CONCLUSION.

No special or important reasons exist for this Court to grant the petition for a writ of certiorari to the Third Circuit Court of Appeals.

It is respectfully submitted that the petition be denied.

Respectfully submitted,

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Dated: June 14, 1966.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 139

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,
AND
THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
STATUTES INVOLVED	1
STATEMENT OF THE CASE	5
Nature and Stage of the Proceedings	5
History of the Litigation	7
1. Early Prosecution	8
2. 1952 Legislation	9
3. Diamond State Telephone Co. Tariff	9
4. Chancery Court Action	9
5. Public Service Commission Hearing, Findings, and Opinion	10
(a) Burden of Proof	11
(b) Evidence	11
(c) Findings	12
6. Delaware Superior Court Appeal	13
7. Delaware Supreme Court Appeal	14
8. United States Supreme Court Appeal	14
9. Motion for Preliminary Injunction in United States District Court	14
10. Appeal to the United States Court of Appeals	15
Analysis of Facts in Record Below	15
1. Nature and History of Petitioner's "Business"	15
2. Customers of Delaware Sports Service	17
3. Joint Statement of Joseph and Albert Tollin Dated April 14, 1958	19
4. Joseph Tollin's Testimony Before District of Columbia Public Utilities Commission	20
5. Testimony of Law Enforcement Officials	21
6. Petitioner's Evidence	26
Conclusion Regarding Petitioner's "Statement of the Case"	27

INDEX (Continued).

	Page
REASONS FOR NOT GRANTING THE WRIT	28
Summary of the Argument	28
I. 18 U. S. C. § 1084(d) Does Not Preempt the Field	28
II. The State Court Decision Is Res Judicata	28
Argument	29
I. 18 U. S. C. § 1084(d) Does Not Preempt the Field	29
II. The State Court Decision Is Res Judicata	39
Conclusion	42

TABLE OF CASES.

Page

Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. C. D. C. 1949) 33

Delaware Sports Service v. Diamond State Telephone Company, 241 F. Supp. 847 (D. C. Del. 1965) 15

Delaware Sports Service v. Diamond State Telephone Company, — Del. —, 202 A. 2d 568 (Del. Supreme Ct. 1964), cert. den. 379 U. S. 965 (1965) 7, 14, 34

England v. Louisiana Medical Examiners, 375 U. S. 411 (1964) 28, 41

Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96 (1866) 31

Grubb v. Public Utilities Commission of Ohio, 281 U. S. 470 (1930) 28, 41

Hamilton v. Western Union Telegraph Company, 34 F. Supp. 928 (D. C. S. D. Ohio 1940) 33

Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19 (1820) ... 32

Howard Sports Daily v. Weller, 179 Md. 355, 18 A. 2d 210 — (Ct. of App. 1941) 33

In Re Delaware Sports Service, — Del. —, 196 A. 2d 215 (Del. Super. Ct. 1963) 13

In Re Delaware Sports Service, — Del. —, 202 A. 2d 568 (Del. Supreme Ct. 1964) 14

Kaufman v. Shoenberg, 154 F. Supp. 64 (D. C. Del. 1954) .. 28, 41

Kelly v. Illinois Bell Tel. Co., 210 F. Supp. 456 (D. C. N. D. Ill., E. D., 1962), aff'd. 325 F. 2d 148 (7th Cir. 1963) 34, 35, 39

Lipton v. New York Tel. Company, 125 N. Y. S. 2d 251 (1953) 33

McBride v. Western Union Telegraph Co., 77 P. U. R. (NS) 65, 171 F. 2d 1 (9th Cir. 1948) 15, 32

McInerney v. Ervin, 46 So. 2d 458 (Fla. Supreme Court, En Banc, 1950) 32

TABLE OF CASES (Continued).

	Page
People v. Pollack, 204 Misc. 64, 120 N. Y. S. 2d 363 (1953)	16, 24
Rubin v. Pennsylvania Public Utility Commission, 197 Pa. Super. 157, 177 A. 2d 128 (1962)	33
Savage v. Jones, 225 U. S. 501 (1912)	32
Schwartz v. Texas, 344 U. S. 199 (1952)	32
Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945)	32
Taglianetti v. New England Tel. and Tel. Co., 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954)	33
Telephone News System, Inc. v. Illinois Bell Tel. Co., 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. per cur. 376 U. S. 782 (1964)	34, 35, 39
Tollin v. State, 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951)	8, 15
Tollin v. Diamond State Telephone Co., 39 Del. Ch. 350, 164 A. 2d 257 (Ct. of Ch. 1960)	10
Tracy v. Southern Bell Telephone & Telegraph Company, 37 F. Supp. 829 (D. C. S. D. Fla., 1940)	33
U. S. v. Silliman, 167 F. 2d 607 (3d Cir. 1948), cert. den. 335 U. S. 825 (1948)	28, 41
Vassar v. Raines, 274 F. 2d 369 (10th Cir. 1959), cert. den. 360 U. S. 936 (1959), 362 U. S. 982 (1960)	41
Yager v. Yager, 7 Cal. 2d 213, 60 P. 2d 422 (1936)	40, 41

CONSTITUTIONAL AND STATUTORY PROVISIONS.

	Page
11 Del. C. § 669	8
11 Del. C. §§ 671-676	3, 9
11 Del. C. § 671	1, 30, 37
11 Del. C. § 674	2, 16, 30, 31, 37, 38
11 Del. C. § 675	3, 9, 10
11 Del. C. § 677	3
11 Del. C. § 757	23
26 Del. C. §§ 101, 121, 124, 134	30
26 Del. C. §§ 183, 187	13
48 Del. Laws, Chap. 493	9
Delaware Constitution, Art. II, § 17	37
Illinois Criminal Code of 1961, § 28-1(a)(10)	35
18 U. S. C. § 1084(d)	3, 14, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40
Rev. Code of 1935, Section 4063	8

OTHER AUTHORITIES.

11 Am. Jur., "Commerce," § 102, p. 91	32
House Report No. 967, 87th Congress, 1st Session (1961)	29

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1318.

DELAWARE SPORTS SERVICE, A PARTNERSHIP,
Petitioner,

v.

THE DIAMOND STATE TELEPHONE COMPANY, A CORPORATION OF THE STATE OF DELAWARE,

and

THE STATE OF DELAWARE,
Respondents.

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATUTES INVOLVED.

Section 671 of Title 11 of the Delaware Code provides:

§ 671. Definitions

"As used in sections 671-677 of this title, unless the context indicates a different meaning—

"Call service" means the furnishing of information upon request therefor or by prearrangement over general telegraphic, telephonic or teletypewriter exchange or toll service;

"Dissemination" means the act of transmitting, distributing, advising, spreading, communicating, conveying or making known;

"Person" or "whoever" means a corporation (including a public utility), partnership or association, as well as a natural person;

"Private wire" means any and all service equipment, facilities, conduits, poles, wires, circuits, systems by means of which service is furnished for communication purposes, either through the medium of telephone, telegraph, Morse, teletypewriter, loudspeaker or any other means, or by which the voice or electrical impulses are sent over a wire, and which services are contracted for or leased for service between two or more points specifically designated, and are not connected to or available for general telegraphic, telephonic or teletypewriter exchange or toll service, and includes such services known as "special contract leased wire service", "leased line", "private line", "private system", "Morse line", "private wire" but does not include the usual and customary telephone or teletypewriter service by which the subscriber may be connected at each separate call to any other telephone or teletypewriter designed by him only through the general telephone or teletypewriter exchange system or toll service;

"Public utility" means a person, partnership, association or corporation, owning or operating in this State equipment or facilities for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation."

Section 674 of Title 11 of the Delaware Code provides:

§ 674. Business of disseminating gambling information; receiving gambling information

"No person shall engage in the business of, or receive compensation in any form or measure for, the dissemination of or receive information in furtherance of gambling or for gambling purposes by means of private wire or wires, or by means of a call service."

Section 675 of Title 11 of the Delaware Code provides:

§ 675. Revocation of service contracts; exemption from liability

"Any public utility shall, when it is advised in writing by any law enforcement agency acting within its jurisdiction that any service furnished by it is being used in the dissemination of information in furtherance of gambling, or for gambling purposes, revoke its contract to furnish any such service.

No public utility shall be liable at law or in equity for any damages or penalties, either civil or criminal, for such revocation of contract."

Section 677 of Title 11 of the Delaware Code provides:

§ 677. Sections 671-676 as exercise of police power; construction

"Sections 671-676 of this title shall be deemed an exercise of the police power of this State for the protection of the public welfare, health, peace, safety and morals of the people of this State, and all of the provisions of sections 671-676 of this title shall be liberally construed for the accomplishment of this purpose."

Section 1084(d) of Title 18 of the United States Code provides:

§ 1084. Transmission of wagering information

* * *

(d) "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law, it

shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

STATEMENT OF THE CASE.

Nature and Stage of the Proceedings.

This matter is before this Court on Petitioner's Petition for a Writ of Certiorari to review the decision of February 16, 1966, of the United States Court of Appeals for the Third Circuit (P. App. 1a).[1] That decision affirmed *per curiam* the Final Order of May 13, 1965, of the United States District Court for the District of Delaware wherein the petition for an injunction was denied and the Complaint dismissed (P. App. 2a-13a).

Prior actions in this case have been in the Delaware Public Service Commission, the courts of the State of Delaware, the United States Supreme Court, the United States District Court, and the United States Court of Appeals.

On July 9, 1964, the Supreme Court of Delaware, on an appeal from the Order (R. Super. Ct.-15),[1] dated October 9, 1963, of the Superior Court of Delaware, affirmed *per curiam* (R. Sup. Ct.-7) [1] the opinion of the Superior Court. The Supreme Court Mandate of July 22, 1964 (R. Sup. Ct.-9), affirmed the Order of the Superior Court.

The Order of the Superior Court affirmed the Order (R. Com., D-23) [1] of the Public Service Commission of

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1. References to docket entries in the proceeding before the Supreme Court of the State of Delaware will be as follows: "R. Sup. Ct.- —".

References to docket entries in the proceeding before the Superior Court of the State of Delaware will be as follows: "R. Super. Ct.- —".

References to the record of the Public Service Commission will be as follows: Docket entries will be designated "R. Com., D-1," etc.; Exhibits of Intervenor, State of Delaware, will be designated "R. Com., IX-1," etc.; Exhibits of Respondent, Diamond State Telephone Company, "R. Com., RX-1," etc.; Exhibits of Petitioner, "R. Com., PX-1," etc.; Exhibits of the Commission, "R. Com., CX-1," etc.; references to pages in the transcript of the Hearing before the Public Service Commission will be designated "R. Com., H-1," etc.

References to material included in the Appendix to the Petitioner's Brief will be as follows: (P. App. —).

References to the State Court Record in this Brief are so numerous and extensive that any selection from the Record for inclusion in

Delaware, denied re-argument and permitted the Defendant, Diamond State Telephone Company, to discontinue its service to Plaintiff, Delaware Sports Service. A stay (R. Super. Ct.-16) of the Order of the Superior Court was granted pending the decision on appeal to the Supreme Court. The Order of the Superior Court was based on its opinions of August 6, 1963 (R. Super. Ct.-10) and October 7, 1963 (R. Super. Ct.-14), which were the result of the pleadings, briefs, and oral arguments of counsel before that Court.

Petitioner had previously appealed to the Superior Court from the order (R. Com., D-23) of the Public Service Commission of Delaware, dated October 10, 1962, denying a petition (R. Com., D-2) filed in that Commission by Appellant. This petition had sought relief from the proposed discontinuance of Petitioner's telephone service by the Diamond State Telephone Company, Respondent here. The order of the Commission was based on the findings and opinion of the Commission dated September 12, 1962 (R. Com., D-19) and the opinion on reargument dated October 3, 1962 (R. Com., D-22). The findings, opinion and order were the result of a four-day hearing consisting of approximately 700 pages of testimony (R. Com., D-25-27; H-1-699), some 45 exhibits (R. Com., D-28-31; IX 1-26; PX 1-14; RX 1-2; CX 1-3), the pleadings (R. Com., D-2, 4, 5) stipulations (R. Com., D-6, D-14) and briefs of counsel (R. Com., D-15-18).

Following the Mandate of the Supreme Court, the Attorney General notified the Telephone Company on August 7, 1964, of the Mandate and requested that it discontinue its service to Petitioner after 10 days therefrom unless Petitioner initiated further court remedies (P. App. 41a, 48a, 27a). Petitioner filed a Motion for a Temporary Restrain-

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an Appendix is virtually impossible, and the financial expense involved precludes reproduction of the entire Record in an Appendix. Many parts of the Record important to our case and relevant to disputed issues of fact are quoted in our Brief. The State, therefore, is not filing an Appendix with its Brief.

ing Order in the United States District Court for the District of Delaware on August 14, 1964. This Motion was denied. Petitioner then filed a Motion for a Preliminary Injunction together with his Complaint in the District Court on August 20, 1964; the State filed a Motion to Intervene; and a Brief schedule was set. The State of Delaware, Intervenor previously, was served with the Motion and Complaint and appeared as Intervenor in the District Court through the Attorney General, together with the Diamond State Telephone Company as Defendant, to support the decisions and orders of the Delaware State Courts.

Simultaneously with his action in the District Court, Petitioner sought a writ of certiorari in the United States Supreme Court. The State of Delaware and Diamond State Telephone Company appeared there as Respondents. Certiorari was denied. *Delaware Sports Service v. Diamond State Telephone Company,* 379 U. S. 965 (1965).

Subsequently Petitioner's request for injunctive relief in the District Court was also denied. 241 F. Supp. 847 (D. C. Del. 1965) and reprinted in P. App. 2a-13a. The court below affirmed *per curiam* on appeal. 355 F. 2d 929 (1966) and reprinted in P. App. 1a.

The State of Delaware does not believe that there is any value in merely replying sentence-by-sentence to the contentions in Petitioner's Brief.[2] Instead, there is a need for a complete statement of facts to explain the history of the litigation, to cover the facts which are in the entire record, and to discuss the totality of the findings and opinions of the Commission, the Superior Court, the Supreme Court, the United States Supreme Court, and the United States District Court. We rely, therefore, on our own Statement of the Case and our Argument.

History of the Litigation.

The volume of "flash" race results provided by Delaware Sports Service has helped to nourish and nurture the

2. References to Petitioner's Brief will be designated (PB- —).

malignant growth of organized bookmaking in a large part of the entire country. Telephone service is the life blood of the enterprise. Removal of this service would be a serious blow to crime. This is why we have moved from the Superior Court of Delaware, to the Court of Chancery, to the Public Service Commission, back again to the Superior Court, to the Delaware Supreme Court, to the United States Supreme Court, to the United States District Court, to the United States Court of Appeals, and now back again to the United States Supreme Court, with side trips to the District of Columbia Public Utilities Commission and the McClellan Senate Investigations subcommittee's hearings on gambling and organized crime.

The findings and opinions of the Delaware Public Service Commission and the Superior Court support the irresistible conclusion demonstrated in prior proceedings and articulated by Judge Carey in an early scene from this drama, *Tollin v. State,* 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951):

> "This information was obviously of great help to those who receive or place bets, since it included not only racing results but also last-minute details prior to a race. Moreover, *I am not so naive as to believe that Tollin did not realize the news was being used by others to facilitate gambling.* (Emphasis supplied.)

1. Early Prosecution

Litigation with the Tollins dates back to 1950 when Joseph Tollin, deceased father of Albert Tollin, was charged with violation of Section 4063, Rev. Code of 1935, now Section 669 of Title 11 *Del. Code.* At that time, Joseph Tollin headed up Delaware Wired Music Company, Inc., which maintained equipment at 839 Tatnall Street, Wilmington, to receive and disseminate "sporting news". On appeal, the court directed a verdict of acquittal because it found that the operation of a business the same as that involved in the case at bar did not violate *that particular statute. Tollin v. State,* 7 Terry 120, 78 A. 2d 810 (Gen. Sess. 1951).

2. 1952 Legislation

Subsequent to the above case, in an effort to close the legislative gap demonstrated by that decision, the General Assembly, on January 28, 1952, enacted 48 *Del. Laws*, Chap. 493, which became 11 *Del. C.* §§ 671-677. The pertinent sections involved in this case are Sections 671, 674, 675, and 677.

3. Diamond State Telephone Co. Tariff

Diamond State Telephone Company filed a tariff with the Delaware Public Service Commission which provides as follows:

> 20. *Use of Service for Unlawful Purposes*
>
> "Service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."

4. Chancery Court Action

Shortly thereafter, on October 13, 1959, as a result of an investigation by the Delaware Attorney General's office in cooperation with law enforcement officers of various other states, the Attorney General sent the Diamond State Telephone Company a letter requesting it to discontinue its service to Delaware Sports Service unless Sports Service elected to test the matter in court. After Diamond State notified Delaware Sports Service, it filed a complaint on October 22, 1959, in the Court of Chancery of the State of Delaware attacking the validity of Title 11 *Del. C.* § 675 and seeking injunctive relief.

On cross-motions for summary judgment, Vice Chancellor Marvel enjoined the Telephone Company from discontinuing service to Sports Service prior to a hearing

before the Public Service Commission. *Tollin v. Diamond State Telephone Co.*, 39 Del. Ch. 350, 164 A. 2d 257 (Ct. of Ch. 1960).

This opinion was based solely on the pre-trial motions, without any evidence. The Vice Chancellor's decision was directed to the absence of a hearing provision in 11 *Del. C.* § 675, stating that "Plaintiff's motion for summary judgment will be granted to the extent of enjoining the Defendant, Diamond State Telephone, from terminating Plaintiffs' present telephone service prior to a hearing on the use to which Plaintiffs put such service."

5. Public Service Commission Hearing, Findings, and Opinion

Subsequently, a further notice was given to the Telephone Company by the Attorney General and, in turn, on November 28, 1960, to Sports Service by the Telephone Company. This action precipitated the filing of a petition by Sports Service in the Public Service Commission (R. Com., D-2). The State of Delaware, through the Attorney General, intervened in this proceeding with the consent of petitioner and respondent (R. Com., D-5). The Commission first made a decision on December 14, 1961 (R. Com., D-12), that it had jurisdiction of the petition even if all calls received by Sports Service came from outside the State of Delaware.[3] The basis for jurisdiction was 26 *Del. C.* §§ 134, 135.

Thereafter, an extensive hearing before the full Commission was held for four days, March 12-15, 1962. In addi-

3. The premise of the alleged exclusive interstate nature of petitioner's business was not conceded by either the Attorney General or the Telephone Company and later refuted by evidence before the Commission (R. Com., H-236, 252, 255). It was also shown at the hearing that Western Union money orders, paying in advance for service, might be sent to Sports Service from outside the State by persons who might then call Sports Service from within the State to obtain racing results (R. Com., H-391, 683). Thus, this issue should be moot. Petitioner contested, however, the jurisdiction of the Public Service Commission in his Motion for a Preliminary Injunction before the U. S. District Court for the District of Delaware.

tion to a considerable amount of testimony and exhibits, the Commission, on its own motion and with complete agreement by all parties, visited Sports Service at its present location at 601 Tatnall Street, Wilmington, Delaware, to get a firsthand view of the operation.

On September 12, 1962, the Public Service Commission filed its Findings and Opinion (R. Com., D-19) denying the relief prayed for in the petition of Delaware Sports Service, thus clearing the way for the removal of the telephones. After denial (R. Com., D-22) of Delaware Sports Service's petition for rehearing (R. Com., D-20), the Commission entered the order (R. Com., D-23) from which Delaware Sports Service took an appeal.

We will analyze the findings and opinion of the Commission, giving references to the page numbers thereof appearing in R. Com., D-19.

(a) *Burden of Proof.* The Attorney General and Diamond State had contended that petitioner had the burden of proof; however, the Attorney General had determined to go forward with his evidence solely for the convenience of moving the hearings forward. The Commission ruled that the Attorney General's position was "well founded" (R. Com., D-19, pp. 3-4).

(b) *Evidence.* The Commission reviewed the testimony of several of the witnesses (R. Com., D-19, pp. 5-10) which will be reviewed in detail in the next section of this Statement of the Case. The Commission discussed the question of admissibility of certain of this testimony (*e.g.*, ruled in favor of admissibility of statements of Joseph Tollin, deceased, and ruled against admissibility of certain correspondence between State Detective Wassmer and various police departments). With respect to the Commission's utilization of evidence placed before it, the Commission determined to disregard certain evidence out of fairness to petitioner, notwithstanding the provision of 26 *Del. C.* § 183 that the Commission "shall not be bound by the technical rules of evidence" (R. Com., D-19, pp. 9-11).

The Commission reviewed the evidence offered by petitioner, including the testimony of Albert Tollin (R. Com., D-19, pp. 11-15). There appears to be no controversy that Delaware Sports Service has persons working at or near various racetracks around the country, that these persons determine, by the use of a pitch-catch signal system or related scheme, the unofficial winner of a given race and telephone that information to Wilmington instantaneously. Customers of Delaware Sports Service can find out this information within 20-25 seconds after the race is over by sending a Western Union money order in advance and by thereafter calling Delaware Sports Service and receiving the name or number of the winner immediately. The question of the identity and occupation of his customers and the use of the information was the crucial inquiry. Although the Commission found that Joseph Tollin had admitted in a statement co-signed by Albert Tollin, and had expanded on this admission before the District of Columbia Public Utilities Commission that "our services have practically no value except to bookmakers and professional bettors" (R. Com., D-19, p. 8). Albert Tollin now disclaims this knowledge (R. Com., D-19, p. 14).

In addition, the members of the Commission visited the premises. Their findings, which are not elaborated on elsewhere in the record, are found at page 15 of their Opinion (R. Com., D-19, p. 15).

(c) *Findings.* The Commission, after stating that it reviewed the entire record at some length but had touched upon what it referred to as only the "more salient aspects" of the record, concluded that the record showed that there existed in the minds of Diamond State and the State of Delaware "an honest belief, if not a confirmed conviction", that Delaware Sports Service was using Diamond State's service to further illegal gambling. The Commission concluded that Delaware Sports Service had failed to rebut this conclusion, setting forth its reasons therefor in its Opinion dated September 12, 1962 (R. Com., D-19, pp. 15-20).

After publication of the Findings and Opinion of the Commission, Delaware Sports Service filed a petition for rehearing (R. Com., D-20). The petition for rehearing was not timely, but the Commission elected, in an effort of abundant fairness to petitioner, to overlook the procedural irregularity and consider the petition on the merits. The Commission qualified one finding relating to a statement concerning Albert Tollin's knowledge of his previous testimony.[4] In all other aspects the findings and opinion were unchanged (R. Com., D-22).

6. Superior Court Appeal

On appeal to the Superior Court of the State of Delaware from the order of the Public Service Commission, Petitioner's arguments related to alleged denial of due process, whether or not the Commission conformed to 26 *Del. C.* §§ 183, 187, and attacks on the evidence. The Superior Court affirmed the decision of the Public Service Commission in favor of the Telephone Company and the State. *In Re Delaware Sports Service,* — Del. —, 196 A. 2d 215 (1963).

Following this decision in the Superior Court, Petitioner then filed a motion for re-argument (R. Super. Ct.-11) which was duly answered by Respondents (R. Super. Ct.-12, 13). Petitioner's stated grounds for seeking re-argument were not only without merit, it also sought to re-litigate and repeat arguments already thoroughly considered by the court. Petitioner's motion for re-argument was therefore denied in the court's opinion dated October 7, 1963 (R. Super. Ct.-14). The appeal to the Delaware

4. ". . . Tollin's lack of knowledge primarily concerned his father's sworn testimony before the District of Columbia Public Utilities Commission. Albert Tollin's testimony before us was at variance with that of his father and his own signed statement on one very important point—the use to which bookmakers put Petitioner's service. The disparity between the sworn testimony of those who knew most about Petitioner's service cannot be diminished and was not satisfactorily explained by Petitioner. Our over-all evaluation of Albert Tollin's testimony remains unchanged, however, and we find no basis for changing the result."

Supreme Court followed the Superior Court's order (R. Super. Ct.-15) of October 9, 1963.

7. Delaware Supreme Court Appeal

The appeal of Sports Service to the Supreme Court of the State of Delaware involved virtually the same arguments as those used before the Superior Court. Following briefing and oral arguments, the Supreme Court affirmed *per curiam* on July 9, 1964, the opinion of the Superior Court (R. Sup. Ct.-7). *In Re Delaware Sports Service,* — Del. —, 202 A. 2d 568 (1964). A Motion for Reargument (P. App. 71a) was denied (R. Sup. Ct.-9). The Supreme Court then issued its Mandate of July 22, 1964, whereby the Order of the Superior Court was affirmed (R. Sup. Ct.-9).

It is significant that Petitioner advanced Federal law as being pre-emptive in his Motion for Reargument before the Delaware Supreme Court and specifically argued § 1084(d) in his oral argument there, so that the Delaware Supreme Court clearly had § 1084(d) before it when it denied reargument. It was so admitted by Petitioner in his oral argument before the United States District Court although he appears now (PB 21, 23) to deny having done so.

8. United States Supreme Court Appeal

Concurrently with his action for injunctive relief based on jurisdictional grounds before the United States District Court, described in the next paragraph, Appellant petitioned the United States Supreme Court for a writ of certiorari to the Delaware Supreme Court. The petition for certiorari was denied. *Delaware Sports Service v. Diamond State Telephone Company,* 378 U. S. 965 (1965).

9. Motion for Preliminary Injunction in United States District Court

On August 20, 1964, Delaware Sports Service filed a Motion in the United States District Court for the District of Delaware for a Preliminary Injunction. This Motion followed one filed on August 14, 1964, for a Temporary

Restraining Order which had been denied by the District Court. These actions were concurrent with the aforementioned petition for certiorari to the United States Supreme Court and sought to establish that the District Court had jurisdiction of the case. Following submission of briefs, the Court asked for further simplification of the issues by means of letter memoranda (P. App. 61a). After oral argument (P. App. 73a-94a), the Court issued its Opinion (P. App. 95a-104a) which held in favor of the Telephone Company and the State. *Delaware Sports Service v. Diamond State Telephone Company*, 241 F. Supp. 847 (D. C. Del. 1965). Plaintiff's Motion for Reargument (P. App. 105a) was denied (P. App. 108a). The Court's Final Order of May 13, 1965, thus denied Plaintiff's request for an injunction and dismissed the Complaint. The appeal to the Court below followed.

10. Appeal to the United States Court of Appeals

The Court below affirmed *per curiam* the Order of the District Court. 355 F. 2d 929 (1966) and reprinted in P. App. 1a. The petition to this Court followed.

Analysis of Facts in Record Below.

1. Nature and History of Petitioner's "Business"

In the early days of their business, the Tollins received horse racing information from Continental Press Service, a service subsequently put out of business by the Kefauver Committee (R. Com., H-557).[5] A great deal of information about each race had been disseminated by the Tollins, as the court found in *Tollin v. State, supra.* Upon discontinuance of major sources of track information, Joseph Tollin set up his own system for rapidly transmitting race results from inside the track to his racing news headquarters in Wilmington. This system consisted of having a "pitcher" inside the track give wigwag signals or other pre-arranged signals to a "catcher" just outside

5. See also *McBride v. Western Union Telegraph Co.*, 77 P. U. R. (NS) 65, 171 F. 2d 1 (9th Cir. 1948).

the track who relayed the information to Sports Service in Wilmington where it in turn was distributed to various customers throughout the country (R. Com., H-9, 57, 60-63; JTDC-243-46).[6] See also *People v. Pollack*, 204 Misc. 64, 120 N. Y. S. 2d 363, 364-365 (1953).

Subsequent to the passage of the present statute in 1952 (particularly Section 674) prohibiting dissemination of horse-racing information for gambling purposes or in furtherance of gambling, the Tollins changed their mode of operation and tailored the kind of racing information flashed to customers to include only the unofficial winner of a given race (R. Com., H-526, 592; JTDC-248, 264). This information is the key information to off-track bettors and bookmakers for the following reasons: (a) the unofficial winner is almost always the final official winner (R. Com., H-132, 212); (b) the service is so rapid (varying from instantly to no more than a minute) (JTDC-249; R. Com., H-632). In fact, the service is so fast that a customer, by holding open a telephone line to Sports Service from just before the time a race should start can establish the times of actual race start and finish with the accuracy needed by a bookmaker to prevent being past-posted or to engage in past-posting illegal off-track bettors (R. Com., H-608; PX-3, p. 306). Since there are usually fixed intervals between races, e.g., 30 minutes, knowledge of the actual time of the first race allows the customer accurately to calculate the times of subsequent races that day (JTDC-249-50); (c) having up-to-the-minute information on winners helps the bookmaker in making decisions on "lay-offs" on subsequent races; (d) it stimulates further betting by informing the bookmaker's customer if he

6. In Florida, such methods for obtaining and distributing horse racing information prior to 30 minutes from the end of the race, with exceptions not pertinent here, is a violation of Florida laws (R. Com., IX-8; H-87-92, 110-111, 115). "JTDC" will hereafter refer to the testimony of Joseph Tollin before the District of Columbia Public Utilities Commission on April 23, 1958, made a part of this record by Exhibit "C" to Stipulation of August 10, 1961 (R. Com., D-6). The page numbers refer to that transcript.

has won, thereby allowing him to place further bets the same day (R. Com., H-130-33, 182-184).

An example of the attempt by Delaware Sports Service to tailor its operations to avoid the present statute is the unexplained contention of Albert Tollin that telephone calls from within the State of Delaware are not accepted by Sports Service.[7]

The Tollins have always conceded that speed in transmitting results is their stock-in-trade and that they would be out of business without it (R. Com., H-581, 619, 622-23, 627). Joseph Tollin readily admitted that their service is faster by some 12-40 minutes than the other services, including Armstrong and Triangle, corroborating the testimony of other witnesses (R. Com., H-376, 515-518, 616; JTDC-249, 256). Even Albert Tollin so concedes (R. Com., PX-3, p. 341). It is only when some feature race is radioed or televised directly, either as a public service of the network or for a paying advertiser, that Sports Service's timing is equalled or bettered, but these instances are infrequent.

2. Customers of Delaware Sports Service

The procedure for obtaining information from Sports Service is fixed and simple. A person using any name he chooses sends in to Sports Service a Western Union money order of $20 for one result, $30 for two results, $40 for three results, or $50 for four or five results (R. Com., H-603, 605). Later, allowing sufficient time, approximately 1½ hours (R. Com., H-622-23), for receipt of the money order, he calls in to Sports Service and receives the number of track results he has paid for from the track of his selection (R. Com., H-77-81). Fictitious names and addresses are commonly used by the subscribers, and the money order

7. Compare Albert Tollin's inability to give a reason for not selling to Delaware customers (R. Com., H-666) with his unconvincing alleged method of distinguishing such calls by their degree of clarity (R. Com., H-682) and his admission that he did not know where the calls came from (R. Com., H-655).

and calls for service may emanate from different locations (R. Com., H-88, 195, 110, 113; JTDC-246). While Albert Tollin maintains that Sports Service operators always admonish the callers that the information is not to be used illegally (R. Com., H-561), there is no way of checking on one already engaged in illegal betting.[8] If the payment is received in advance, the information is always given out (R. Com., H-603).

As a matter of fact, Albert Tollin claimed that he has never tried to find out who his customers are (R. Com., H-539). He conceded that the flash service was of value to bookmakers (R. Com., H-627-28) but that he has never tried to ascertain whether or not any of his customers are bookmakers. He has not even checked the names of customers (Mitchell Slifken, Santo Damiano, and Frank Sorrentino) who the McClellan Committee in their hearings of August 22-31, 1961, advised him are bookmakers (R. Com., H-564). He claimed not to know whether the names used by customers are fictitious (R. Com., H-562). With respect to the *one* customer whom he had *met*, he said he would not be surprised to learn that he was in the business of disseminating horse racing information (R. Com., H-553, 575, 576, 619). He later testified that he sold results to Angelo Rossetti in Boston and also received horse racing information from him (R. Com., H-661, 681). Rossetti has a long criminal record including gambling offenses (R. Com., IX-15).

Albert Tollin purported to believe, moreover, that bookmakers would have little use for his services and that his customers were really touts, horse owners, horse trainers, or persons who send bets via others to the track (R. Com., H-549-52, 566-67). The alleged reason why these people pay for his expensive service rather than wait a half-hour and receive it free from regular press services is that they must relieve their extreme anxiety and cannot wait (R. Com., H-581-83). This contention is made even

8. See Commission's Findings, R. Com., D-19, p. 17.

more amazing by the testimony of an accountant for the McClellan Committee that the average *annual* gross income of Sports Service for the years 1955 to 1960 was approximately $262,700 (R. Com., PX-3, p. 322). Albert Tollin was unable to name a single person in these categories who subscribed to his service (R. Com., H-566, 567, 569). In contradiction, Joseph Tollin freely conceded that none of these persons would have a use for the service (JTDC-249-51, R. Com., IX-14).

It is well to recognize at this point that Albert Tollin not only disclaimed knowledge of his customers but also disclaimed any expertise in the bookmaking business (R. Com., H-557). More importantly, he corroborated the testimony of others that his father, Joseph Tollin, was an *expert* on both horse racing and bookmaking (R. Com., H-381, 557-559). The only conclusion possible, therefore, from Albert's own testimony, is that greater weight is to be given the testimony of his father, Joseph, than his own with respect to the uses of the information disseminated by Sports Service.

3. Joint Statement of Joseph and Albert Tollin Dated April 14, 1958

Both Albert and Joseph Tollin signed, on April 14, 1958, a revealing statement (R. Com., IX-14) as to their business. This statement was witnessed by State Detective Walter J. Wassmer and Thomas LaVernia, an investigator for the Chesapeake and Potomac Telephone Company. The significant part of the statement reads:

> "Our business is to get flash results to our customers before the radio and newspaper announcements. We have to do this to survive. Our services have practically no value except to bookmakers and professional bettors."

Albert's later lame assertions that he did not want to upset his father (R. Com., H-558-59) and that he did not read the

statement (R. Com., PX-3, p. 304) as excuses for his signing should be given little weight in the light of his foregoing admissions.

4. Joseph Tollin's Testimony Before District of Columbia Public Utilities Commission

Subsequently, on April 23, 1958, Joseph Tollin testified before the Public Utilities Commission of the District of Columbia, in connection with an application of a company named Sports News Service, Inc., for telephone service in Washington, and commented further on the need of bookmakers and professional bettors for his service (JTDC 249-50; emphasis supplied):

> "Q. Is there a need for that service?
>
> A. There is a need for that type of service, because so many different sections want to know the off time of that first or particular race so that they can then judge for the rest of the day what they are going to be able to do. They don't have to call back for the service no more. Laurel is going off at 1:30, which is official time for it to go off they know it goes off at 1:38, they know they have got five to eight minutes in each race that they can lag behind and still be in the clear.
>
> Q. Why is that necessary, to know whether they are in the clear or not?
>
> A. *Well, if they are interested in taking bets or making bets, it works both ways.*
>
> Q. I wish you would explain to me, sir. Why is it so important to know what is the off time of the race?
>
> A. Well, it is important to know that because those conditions can be—*you have more time to know how you are able to take a bet.* See, a lot of people come in late, and *a lot of people want to bet after they are over,* too, if you are foolish enough to take the bet.
>
> Q. So people who are interested in taking bets want to get the fastest service available, is that right?

A. That's right.

Q. *For two reasons, to know how late to take a bet and also to keep somebody from betting on a race that's already been run.*

A. *That's right.*"

Joseph Tollin further freely testified (JTDC-256; emphasis supplied):

"Q. Is their service of any value to bookmakers?

A. Yes, sure. See, no service is just as valuable to bookmakers, because if he wanted to take his business up to one o'clock and stop, he can go to the next day and it's just as valuable to him; that's the end of it.

Q. *But your service is more valuable?*

A. *It's more valuable, because he can get a larger amount of business by being able to stay in business till two o'clock, three o'clock, and so on, to the end of the——*

Q. *The rest of the afternoon, hey?*

A. *Until the afternoon is over.*"

It is important to realize that Joseph Tollin was referring to the same kind of race result, i.e., the name and post number of the unofficial winner, as is disseminated by Sports Service today. Furthermore, the evidence is uncontroverted that Joseph Tollin was the organizer and guiding light of Sports Service until his death in 1960 and understood fully the uses being made of its service. It is submitted also that Albert Tollin's detachment from his customers and apparent lack of knowledge of their uses of his information are all part and parcel of the carefully contrived mode of operation tailored to minimize the risk of Sports Service being held in violation of our gambling laws.

5. Testimony of Law Enforcement Officials

At the expense of prolonging this Brief, the State feels it is advisable to place before the Court an analysis of the

testimony of the law enforcement officials who testified. The purport of their testimony must be placed in its proper perspective because of the fact that Petitioner often has quoted portions of this testimony out of context and otherwise unfairly presented it.

The witnesses called by Intervenor included highly placed law enforcement officers from several states, as well as a member of the Thoroughbred Racing Association Protective Bureau. These are some of the persons from outside Delaware who have participated in the effort to rid Delaware of this valuable aid to organized gambling.

It is important to reiterate at this point that the Delaware Public Service Commission based its decision on evidence of sound probative value. While the rules of the Commission allow it to admit hearsay and opinion (Rule 183), and a considerable amount of such evidence entered the record from both parties, the Commission distinguished such evidence so as to ground its decision on evidence following the technical rules. The following summary is, therefore, not a complete summary of all the evidence introduced, but some of the evidence having probative value supporting the findings of the Commission.

Former Delaware State Detective Walter J. Wassmer testified[9] as to the toll analyses he secured by use of an Attorney General's subpoena. These official records of the Telephone Company showed telephone calls between Sports Service and other telephone numbers in and out of the State. Law enforcement officials in the states involved were requested to determine whether or not the persons to whom these numbers were listed had criminal records and specifically gambling records. These toll analyses have been made periodically in Delaware (R. Com., H-273-75, 291, 309, 383-84, 407). Out-of-state law enforcement officers also subpoenaed records of Western Union to ascertain who was sending moneys to Sports Service. These officers also made

9. Another aspect of Wassmer's testimony (i.e., the statement of Joseph and Albert Tollin, R. Com., IX-14) has been referred to previously.

toll analyses of calls to Sports Service from particular telephone numbers in their states (R. Com., H-19-26, 29, 55, 64, 67-76, 117, 124).

The Delaware investigation covered twenty-six states (R. Com., H-325-26). Due to the obvious limitations on funds, facilities, and personnel, representatives from all of these states were not brought to Wilmington to testify at the hearing before the Commission. Instead, Detective Wassmer testified at length on some of the states from which witnesses were not produced. His testimony is supported by official police records and communications from and to those states including the criminal records of some of the persons involved. Since many of these documents were prepared in the regular course of business, they are admissible under the formal rules of evidence. The states include Indiana, Illinois, Ohio, New Jersey, Pennsylvania, Massachusetts, and New York (R. Com., IX-4-7, 15, 16, 18, 20-25; R. Com., H-20-25, 277, 280-84, 294, 296-99, 311, 315-25, 360-62).

Detective Wassmer made personal visits to New Jersey, New York, Pennsylvania, and Washington, D. C., to verify the information obtained from the local officers (R. Com., H-275, 291, 293). Furthermore, the record shows that the telephone toll analyses were made in a legal manner (R. Com., H-274) and were based on toll slips and Telephone Company records personally compiled by Wassmer (R. Com., H-309, 383-84, 407). There is no merit to the suggestion that this information was illegally obtained in violation of 11 *Del. C.* § 757 or otherwise. It was unnecessary to refer to telephone conversations to obtain the desired information, which was available from regularly kept records of the Telephone Company.

Another technique used by law enforcement officers was the use of mail surveys. From a 30-day survey beginning March 11, 1960, of Sports Service mail transmitted through the Wilmington Post Office, Detective Wassmer was able to identfiy only one actual person, Kenneth Hanna. Hanna

had a criminal record which included arrest and conviction for gambling offenses (R. Com., H-364, 412-13).

Witnesses from the State of New York were Francis X. Smith, Chief of the Rackets Bureau of the District Attorney's Office of Queens County; Benjamin Kossoff, Queens County Detective; and Daniel D. Moynihan, Special Agent with the New York State Commission of Investigation.

Mr. Smith testified that he has been investigating the activities of Sports Service and its employees in New York since late 1952 (R. Com., H-8), when he met Ralph Atlas, alias Rudolph Atlas, Joseph Tollin's overseer of the pitcher-catcher teams (R. Com., Ex. C., p. 243). See *People v. Pollack,* 204 Misc. 64, 120 N. Y. S. 2d 363 (1953). Mr. Smith related how racing results were obtained from inside the track by Sports Service employees who immediately relayed the information by telephone to Wilmington (R. Com., H-9-10). Both Mr. Smith and Mr. Kossoff testified as to their continuing toll analyses of Western Union money orders sent to Sports Service (R. Com., H-29, 68-70); that over the years they had been able to find only one actual person, Frank Acetta, who had sent such a telegram, because of the fictitious names and addresses used by the other subscribers. Frank Acetta has a bookmaking record which was duly authenticated and admitted into evidence (R. Com., IX-4; H-26-28, 40, 42, 48, 50).

In addition to testifying on toll analyses, Mr. Kossoff described how he sent $30 in May 1961 by money order to Sports Service and then called in the next day to Sports Service and obtained the winners of the first and second races at Aqueduct for that day (R. Com., H-67-68, 71-72).

Mr. Moynihan described in detail the use of toll analyses in planning and conducting large scale raids, which he supervised (R. Com., H-117), on gambling joints in the State of New York (R. Com., H-121-141; R. Com., IX-5). As to the value to bookmakers of "flash" results, Mr. Moynihan added to the other reasons given (past-posting,

etc.) the value to the bookmaker in rapidly evaluating his position to determine whether he should "lay-off" bets on subsequent races that day or take more of them himself (R. Com., H-124-25). When asked how he knew that horse racing information received from Sports Service was being used for bookmaking purposes, his *personal* knowledge was described in detail in the record (R. Com., H-118-119).

Martin Dardis, Investigator for the Attorney General of Florida, testified that he telephoned Albert Tollin early in January, 1962, to ascertain if he could obtain Florida track information after Hialeah opened (R. Com., H-88). On February 6, 1962, Dardis sent Sports Service a $30 money order under the name of "Pete Taylor" for results on Hialeah's fifth and sixth races on February 9 (R. Com., H-104-105). On February 9, 1962, Lt. Frank Kappel, Dade County Police Supervisor, in the presence of Dardis telephoned from Florida to the Sports Service Wilmington telephone number OL 6-2501 and obtained the winner of the fifth race at Hialeah at 3:29 P. M. and the winner of the sixth race at 4:00 P. M.. The information on the fifth race was obtained within a few minutes of the finish of the race. Kappel actually waited on the telephone while the race was being run, in spite of the fact that Florida has the aforementioned 30-minute delay law (R. Com., H-105-110).

Edward C. McMahon, an Agent for the Thoroughbred Racing Association Protective Bureau (T. R. A. P. B.), testified as to the great value of flash race results to off-track bettors (R. Com., H-180-84) and to the stringent measures most race tracks have instituted to prevent flash dissemination (R. Com., H-178-79, 212).

In addition to the *personal knowledge* attested to by the witnesses, as outlined in this summary and given in full detail at the hearing, it was the *expert opinion* of *all* the law enforcement officers who testified, that the information disseminated, i.e., the name and number of the official winner of a race, is usable only by bookmakers and professional bettors (R. Com., H-31-32, 44, 45, 48, 52, 59, 124, 125,

131-38, 151-53, 155-56, 377). The T. R. A. P. B. official, another expert, corroborated these opinions (R. Com., H-179-86, 207-08, 216). For this reason flash dissemination of racing information is prohibited by the Code of the T. R. A. P. B. and the Maryland Racing Commission (R. Com., H-218, 472, 482, 485-86, 489, 491). Joseph Tollin, himself, stated this to be the only possible use (R. Com., IX-14).

6. Petitioner's Evidence

The witnesses called by Delaware Sports Service not only failed to rebut the record made by Intervenor, and they not only failed to show any legitimacy to the operation of Delaware Sports Service, but these witnesses themselves fortified the State's position.

The Petitioner's attempt to compare its activities with those of legitimate established radio stations and newspaper media is obviously without merit.[10] There are, of course, many crucial differences and, as one witness testified, such a comparison is unfair (R. Com., H-346). The most important difference, of course, is the speed with which a racing result is brought from the track to the user. The media represented by witnesses in this phase of the Petitioner's case are in the general news business and obtain their income from advertisers, not subscribers to their broadcast services (R. Com., H-344, 426-27, 439, 509). They do not have fictitious subscribers (R. Com., H-345) or subscribers paying them $20 to obtain the result of one race (R. Com., H-345). They obtain their racing information usually by means of the wires of a regular news service, such as the Associated Press, and are not in violation of the law (R. Com., H-343); i.e., they do not employ pitchers and catchers from inside to outside the track (R. Com., H-342, 421-26, 440, 448). They do not give out racing results to telephone callers and in no sense operate a call or

10. The Commission so concluded. Findings and Opinion, R. Comm., D-19, pp. 11-19.

flash service (R. Com., H-343-44, 425-26, 437, 452, 507-08, 510). Most importantly they all testified that there is a considerable time delay between the end of a race and the time of any broadcast they make concerning the race, except for special events (R. Com., H-422, 468-70, 504). In fact, the testimony establishes that elimination of this time lag would violate F. C. C. regulations and policy (R. Com., H-344-45, 427-28, 507-08), which were set up for the specific purpose of preventing the use of flash horse racing results by bookmakers.

Another witness for Petitioner, the Vice President and General Manager of Delaware Park, described the facilities and method of operation used by regular news media to transmit race results out of the track to their offices. A pertinent fact is that the public telephones at the track are not allowed to be used throughout the racing period of the day to prevent their use at that time in transmitting results (R. Com., H-489-91).

Conclusion Regarding Petitioner's "Statement of the Case"

Since the party which is presenting this case to the Court has seen fit not to explain the entire facts which are in the record of the proceedings in the State courts or to discuss the totality of the findings of the Commission and courts whose decisions it questions here, we have found it necessary in the preceding pages to set forth the facts perhaps more fully than is ordinarily required.

REASONS FOR NOT GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

I. 18 U. S. C. § 1084(d) Does Not Preempt the Field.

The legislative history and the language of 18 *U. S. C.* § 1084(d) are clear that this statute was intended to aid and assist the state police power in controlling illegal gambling and is not preemptive in any way.

II. The State Court Decision Is Res Judicata.

The facts of this case bring it within the purview of *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470 (1930); *U. S. v. Silliman*, 167 F. 2d 607 (3d Cir. 1948), cert. den. 335 U. S. 825 (1948); *Kaufman v. Shoenberg*, 154 F. Supp. 64 (D. C. Del. 1954), and require the application of *res judicata*.

Petitioner voluntarily chose and remained in the State courts as long as possible. All relevant Federal questions were faced and decided in the State courts. The Petitioner, therefore, does not come within any of the exceptions to *Grubb* provided by *England v. Louisiana Medical Examiners*, 375 U. S. 411 (1964).

ARGUMENT.

I. 18 U. S. C. § 1084(d) Does Not Preempt the Field.

When the Delaware Public Service Commission decided on December 14, 1961, that it had jurisdiction, the Federal statute 18 *U. S. C.* § 1084(d), on which Petitioner now relies, had been in effect approximately three months. Except in his Motion for Reargument before the Delaware Supreme Court, in the State Court proceedings Petitioner did not advance § 1084(d) as a basis for Federal, rather than State, jurisdiction. He did contest State jurisdiction on the basis of 18 *U. S. C.* § 1084(d) when he brought his action before the Federal District Court in 1964, but this was after the Delaware Supreme Court had faced and decided this Federal question. It is significant that Petitioner did not promptly move to the Federal forum soon after the enactment of 18 *U. S. C.* § 1084(d), but instead elected first to exhaust every procedure possible in the State forum.

Irrespective of the history of Petitioner's attitude towards jurisdiction, neither § 1084(d) nor any other Federal legislation preempts the field so that the Commission should not have assumed jurisdiction as it did. The legislative history of § 1084(d), contained in House Report No. 967, 87th Cong., 1st Sess. (1961), U. S. Code Congressional and Administrative News 2631 and 2633-34, makes it crystal clear that the purpose of the law was to "assist" and "aid" the States in suppressing illegal gambling activities by depriving them of the use of communication facilities. Preemption obviously was not the purpose.

The language of § 1084(d) itself makes it abundantly clear on its face that § 1084(d) is not preempting the field. It may be brought to bear when either a "Federal, State, or local law" is violated. Specific mention is made of determinations "in a Federal Court or in a State or local tribunal or agency."

Not only are Petitioner's contentions as to preemption by § 1084(d) wholly without merit, they constitute an attempt to misapply § 1084(d). The section comes into play when it is necessary *to compel* an uncooperative or reluctant telephone company *to terminate* service. In the case at bar, the telephone company believed that Petitioner's service was being wrongfully used and voluntarily moved to terminate it. The action here is by Petitioner *to compel* the telephone company *not to terminate* service. As pointed out in the Opinion of the District Court (P. App. 2a-13a), Petitioner's construction of § 1084(d) would prevent the voluntary termination of service and limit it only to actions initiated by the Government, a result clearly contrary to the stated purpose of the law.

The Delaware Public Service Commission correctly determined after briefing by counsel that it had jurisdiction of this case. Opinion of Public Service Commission, December 14, 1961. The question of jurisdiction was considered at great length and the Commission's conclusions were set forth fully and need no further amplification here. It should be noted, in conjunction with this opinion, that the parties had stipulated by Paragraph 3 of the Stipulation of August 10, 1961, that Petitioner operates a "call service" as defined in 11 *Del. C.* § 671, and had thereby brought Petitioner's business also within the purview of § 674.

One pertinent conclusion of the aforesaid opinion was that the Commission could have jurisdiction even on the premise that all telephone calls to Petitioner came from outside Delaware. This was a result of the fact that the telephone company still operates a service or system within Delaware for public use, and jurisdiction still is founded on 26 *Del. C.* §§ 101, 121, 124, 134.

The premise that all calls came from outside Delaware was not conceded, of course, by either the Attorney General or the telephone company. It was, in fact, later refuted by evidence before the Commission (R. 236, 252, 255). It was also shown at the hearing before the Commission that Western Union money orders paid in advance for service as required by Petitioner, might be sent to Petitioner from outside Delaware by persons who might then call Petitioner from within Delaware to obtain racing results (R. 391, 683). Albert Tollin's claim (R. 666) that telephone calls from within Delaware are distinguishable by their degree of clarity is a fantastic contrivance and in contradiction to his other testimony that he did not know where the calls came from (R. 655). The claim is contrary also to his whole studied attempt to minimize knowledge of his customers. Petitioner cannot be heard to say that it operates solely interstate.

It is also clear that the language used in the notices of the Attorney General to the telephone company is not confined to 11 *Del. C.* § 674 but fully meets the requirements of 11 *Del. C.* § 674 and 18 U. S. C. § 1084(d). There is no indication whatsoever in either notice that Petitioner's business is exclusively intrastate or interstate. In fact, the implication of the notices is that Petitioner's business moves both ways. Further, even if it were conceded, and it is not, that the language used relates only to § 674, there is no reason for contending that § 674 applies solely to intrastate commerce. Nor is there any reason for contending that 18 U. S. C. § 1084(d) pre-empts the field of interstate commerce.

It is well settled that a state may exercise concurrent or independent power in all cases except: (1) where power is lodged exclusively in the Federal Constitution, (2) where power is given exclusively to the United States, and (3) where, from the nature and subjects of the power, it must be exercised exclusively by the United States. *Gilman v. Philadelphia,* 3 Wall. (U. S.) 713, 18 L. Ed. 96 (1866);

Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19 (1820). See also *Southern Pacific Co. v. Arizona,* 325 U. S. 761 (1945). The instant case does not fall within any of these exceptions, and, therefore, concurrent or independent power may be exercised by the State of Delaware to the extent that there is no inconsistency or conflict with Federal statutes. *Savage v. Jones,* 225 U. S. 501 (1912); *McBride v. Western Union Telegraph Company,* 171 F. 2d 1 (9th Cir. 1948); *McInerney v. Ervin,* 46 So. 2d 458 (Fla. Supreme Ct., En Banc, 1950). It is not to be presumed that a Federal statute supersedes the exercise of the police power of a state unless the intention to do so is clearly manifested; the exercise of Federal supremacy is not lightly to be presumed. *Schwartz v. Texas,* 344 U. S. 199 (1952).

It is well established that interstate commerce is not immune from the exercise of the police power of a state. This is particularly true in the regulation of gambling. As stated in 11 *Am. Jur.,* "Commerce," § 102, Page 91:

> "Gaming—A gambling transaction involving an instrumentality of interstate commerce appears to be subject of both Federal and state regulation or prohibition if there is no conflict between the state and Federal regulation on the subject."

There is no conflict between any of the laws of Delaware and 18 U. S. C. § 1084(d). In fact, they complement and reinforce each other.

The cases are numerous that illustrate the proposition that a state may exercise its police power to regulate and control gambling. This may be done by means of statutes or it may be done in the absence of a statute. A utility may terminate its service even where there is no state statute. *McInerney v. Ervin,* 46 So. 2d 458 (Fla. Supreme Court, En Banc, 1950). As set forth in the Delaware Superior Court Opinion, a telephone company may take the necessary steps to discontinue its service where

it is reasonably satisfied that such service is being utilized by its customers against public policy, such as in the furtherance of bookmaking, an illegal enterprise in Delaware and other states. *Tracy v. Southern Bell Telephone & Telegraph Company,* 37 F. Supp. 829 (D. C. S. D. Fla., 1940); *Taglianetti v. New England Telephone & Telegraph Company,* 81 R. I. 351, 103 A. 2d 67, 70, 71 (Sup. Ct. 1954). A telephone company may also act to discontinue service where such service is against public policy. *Howard Sports Daily v. Weller,* 179 Md. 355, 18 A. 2d 210 (Ct. of App. 1941); *Hamilton v. Western Union Telegraph Company,* 34 F. Supp. 928 (D. C. S. D. Ohio 1940); *Rubin v. Pennsylvania Public Utility Commission,* 197 Pa. Super. 157, 177 A. 2d 128 (1962); *Lipton v. New York Tel. Company,* 125 N. Y. S. 2d 251 (1953).

It is clear, of course, on the face of 18 U. S. C. § 1084(d) that Federal, state or local law may regulate interstate commerce so as to suppress illegal gambling. There is no hint of Federal pre-emption in the statute, but instead an express recognition of the police powers of a state to suppress illegal gambling information moving interstate.

Turning to other contentions of Petitioner, he attempts (PB 9) to use again *Andrews v. Chesapeake & Potomac Tel. Co.,* 83 F. Supp. 966 (D. C. D. C. 1949) to his advantage although he has argued it since the proceedings before the Public Service Commission and it clearly is not apropos to the case at bar. The *Andrews* case, while decided prior to most of the other cases mentioned herein, is distinguishable, moreover, because it held only that telephone service could not be cut off merely upon receipt of notice from the U. S. Attorney. The court held, nevertheless, that evidence would be considered *even on affidavits.* The effect of *Andrews* was similarly construed in *Taglianetti v. New England Tel. and Tel. Co.,* 81 R. I. 351, 103 A. 2d 67 (Sup. Ct. 1954). In the case at bar, it was only after a lengthy hearing that the Delaware Public Service Commission is-

sued its opinion that Petitioner was indeed furthering illegal gambling and that his telephone service could be discontinued.

Petitioner next assails the decisions of the District and Circuit Courts below with what is really another due process argument and, therefore, is misplaced under the heading of preemption (PB 13-20). In fact, this due process argument of Petitioner does not belong in his Brief at all because it was fully expounded by him in his previous Brief before this Court. *Delaware Sports Service v. Diamond State Telephone Co.*, — Del. —, 202 A. 2d 568 (Del. Supreme Ct. 1964), cert. den. 379 U. S. 965 (1965). In any event, in this argument Petitioner attempts to use *Kelly v. Illinois Bell Tel. Co.*, 210 F. Supp. 456 (D. C. N. D. Ill., E. D., 1962), aff'd. 325 F. 2d 148 (7th Cir. 1963), and *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 210 F. Supp. 471 (D. C. N. D. Ill., E. D., 1962), 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. *per cur.* 376 U. S. 782 (1964) to his advantage although both of these cases are squarely against him and uphold the position of the Respondents.

In *Kelly, supra,* there was no hearing but instead the United States sought to proceed under 18 *U. S. C.* § 1084(d) solely on the basis of an earlier criminal verdict on a related but different matter. The court in *Kelly* merely held that the prior verdict *per se* was not conclusive in showing, for the purpose of an action under § 1084(d), that the facilities were used to transmit gambling information in violation of law. In the case at bar, the proceeding has not been under § 1084(d), there is no reliance on a verdict in another matter, and, in any event, an extensive hearing was held wherein the probative evidence was such that Petitioner was found to be furthering illegal gambling. As the Delaware Public Service Commission stated:

> ". . . Based on the evidence in the record before us, we are constrained to find that Petitioner's service under its present arrangement was being used to aid

illegal gambling in several States, including but not limited to New York, New Jersey, Maryland, and Delaware. The record adequately portrays the information which justified Diamond State in moving to terminate Petitioner's service. Having viewed that evidence and the evidence produced by Petitioner to the contrary, we find the proof clear and convincing. We accordingly determine that Diamond State was justified in concluding that Petitioner was using its telephone service to promote illegal activity."

Even though the case at bar is clearly distinguishable from *Kelly, supra,* it should be recognized that Petitioner reads into *Kelly* far more than either this Court, the Seventh Circuit, or the Third Circuit have chosen to do. Furthermore, in case of any conflict, *Kelly* is superseded by *Telephone News System, Inc. v. Illinois Bell Telephone Company,* 220 F. Supp. 621 (D. C. N. D. Ill., E. D., 1963), aff'd. 376 U. S. 782 (1964) and its predecessor of the same name, reported in 210 F. Supp. 471 (1962). A close examination of this case reveals the true state of the law as proclaimed by this Court as recently as 1964.

In the 1962 case, originated by a letter of April 25, 1962, from the U. S. Department of Justice to Illinois Bell requesting discontinuance of service to Telephone News System, a one-judge Federal District court determined (on the same day that it decided *Kelly, supra*) that the News System's service violated the Illinois statute, § 28-1(a)(10) of the Illinois Criminal Code of 1961. This statute provides that a person commits illegal gambling when he knowingly transmits information as to wagers, betting odds or changes in betting odds by telephones or similar means. The Court concluded that plaintiff violated this statute by playing a recording to anyone who dialed a widely advertised telephone number giving the names of the horses finishing first, second and third and the mutuel price paid by the winner, even though this information was obtained from United Press International Service at least twelve

minutes after the finish of the race and that, furthermore, an average of five or ten minutes of additional time necessarily elapsed before the received information could be recorded and transmitted to persons dialing the plaintiff's telephone number. Plaintiff did not receive any payment from those dialing in but relied solely on a $600.00 per week payment from Illinois Sports News for spot advertising commercials. While the Government did provide one bookmaker who admitted using the service, it is obvious from the Court's opinion that it relied heavily on the facts that plaintiff gave no credible legal use for its service, going out over 70 telephone lines, and that no one placing a legal bet at a race track would have any need to resort to plaintiff's facilities. Parenthetically, it should be noted that in the case at bar the information can be flashed instantaneously to customers; Plaintiff's telephone number is not widely advertised; he is paid by those receiving the information; all expert witnesses testified to the effect that Plaintiff serves primarily bookmakers; there is a signed statement by both Tollins admitting this fact; and there is no other logical explanation for his vast annual business. The Court in the 1962 case then went on to find that Plaintiff was not violating 18 *U. S. C.* § 1084(a) simply because that statute deals only with persons "engaged in the business of betting or wagering," an activity that Plaintiff concededly was not engaging in. The Court next found that Plaintiff's activities were in the ambit of § 1084(d), which provides that a common carrier, subject to the jurisdiction of the F. C. C., must shut off service, after reasonable notice, to any subscriber where the carrier has been notified by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that the subscriber is or will be using the facility or service for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law. § 1084(d) also states that it does not prejudice the right of a person affected to seek a hearing to secure

a determination that the service should not be discontinued. Since § 1084(d) had never previously been considered by a Federal Court, the Court in this 1962 decision decided that a three-judge District Court should be convened to pass on the constitutionality of § 1084(d). This led, of course, to the 1963 decision.

In the 1963 case, the three-judge District Court in a lengthy opinion upheld the constitutionality of both § 1084(d) and the Illinois statute. In doing so, the Court, among other things, completely refuted the argument often made by Petitioner here that everything is gambling information. The Court made the point that whether or not the transmission of particular information is a crime under given circumstances is to be determined not by reference to the term "gambling information" in § 1084(d) but by reference to Federal, State, and local criminal laws which proscribe the sending of gambling information over wire communication facilities (at page 625). In the case at bar, it is 11 *Del. C.* § 674, public policy, the *Delaware Constitution*, Art. II, § 17, and 11 *Del. C.* §§ 671 et seq. that prohibit the furtherance of illegal gambling. It was the finding of the Public Service Commission that Petitioner has been furthering illegal gambling, and it would be the dictate of § 1084(d) and case law that Petitioner's service be discontinued. The Court made the further point that the shutting off of service is not punitive or penal in character but is preventive and regulatory. The whole argument that Petitioner makes wherein he claims that he is being deprived of his life-blood property right without having been found guilty of violating a law is completely exploded by the Illinois District Court in the 1963 opinion. The whole purpose of legislation such as § 1084(d) and § 674, of tariffs such as the one involved in the case at bar, and of the public policy of not condoning or aiding illegal activities is to regulate telephone service so as to suppress illegal gambling. Petitioner's loss of service is incidental to the main object. In the case at bar, the shutting off of telephone service is not

an additional penalty for violating § 674 but it is a sanction to prevent the continued transmission of extremely useful information to bookmakers and thereby hamper and hopefully prevent their activities. The Court also mentioned a variety of other reasons why § 1084(d) is not penal in character.

In the concurring opinion in the 1963 case, which Petitioner discusses (PB 18-20), the concurring judge cogently set forth why he was disturbed that a subscriber's livelihood could be killed in a civil action whereas a criminal action would have imposed only minor fines and also why he was disturbed by the fact that the standard of proof is merely "a preponderance of the evidence" rather than "beyond a reasonable doubt." It is submitted, of course, that conviction in the criminal action would lead directly to discontinuance of telephone service assuming the subscriber did not change his activities to be within the law. The concurring judge, nevertheless, in spite of his doubts as to the overall policy involved, emphatically agreed that all past law was correctly applied in the majority opinion and that the result obtained there was inevitable.

This Court then affirmed the majority decision in the 1963 case, and the 1963 opinion stands as a clear and authoritative guide in deciding the case at bar in favor of the Respondents and against the Petitioner. This Court denied certiorari in 1964 of the case at bar, and Petitioner cannot be allowed to maintain that there are important and unsettled due process questions which should be settled by pronouncement of this Court.

It is submitted further that Federal preemption was not intended by enactment of 18 *U. S. C.* § 1084(d) and that there are no important and unsettled questions in this regard which require decision by this Court.

II. The State Court Decision Is Res Judicata.

Contrary to the contention of Petitioner (PB 20), the actual circumstances of this case do support the application of *res judicata,* as was found by the Court below.

Petitioner misstates the facts (PB 21, 23) when he asserts that the provisions of 18 *U. S. C.* § 1084(d) were not drawn into issue by a supplemental pleading (PB 21) and that the Federal question was not adjudicated by the Delaware Superior Court and the Delaware Supreme Court (PB 23).

The fact of the matter is that *Kelly, supra,* and *Telephone News System, Inc., supra,* both first decided on October 23, 1962, and both dealing primarily with § 1084(d), were briefed and argued before the Delaware Superior Court. Later, before the Delaware Supreme Court, these cases were briefed and argued again. In fact, Petitioner relied so heavily in his briefs before the Delaware Supreme Court on the *Telephone News System* case that the State devoted most of its oral argument before that court to the effects of the case, including § 1084(d) with which it dealt.

Further, it is a matter of record that Petitioner in his Motion for Reargument before the Delaware Supreme Court stated one of his grounds as follows:

> "4. The effect of this Court's decision is to permit a State Regulatory body to authorize discontinuance of service by a long lines operator controlled by the Federal Communications Commission in violation of the rules and regulations of the Federal Communications Commission and *the laws of the United States which have pre-empted this field.*" (Emphasis added.)

Subsequently, in his oral argument before the District Court, Petitioner argued vehemently that he had indeed brought § 1084(d) before the Delaware Supreme Court. This oral argument was recorded and the portion containing Petitioner's position at that time was actually included in

his brief before the Court below. It is remarkable that he now chooses to reverse the position he took before the District Court and adopt one which is not in conformity with the facts of the State proceedings. The State extensively treated the effects of § 1084(d) in its brief on Petitioner's first Petition for Certiorari before this Court which occurred while his action in the District Court was still under way.

Another distortion of fact by Petitioner is his dramatic assertion that he "was forced into the State forum at gunpoint" (PB 24). It is a matter of fact that Petitioner made no attempt to enter the Federal forum until after he had exhausted all the proceedings available to him under the State system. Furthermore, Petitioner cannot be heard to imply that 18 *U. S. C.* § 1084(d) had to be enacted and put into effect before he could proceed in a Federal forum. Surely the sophisticated legal counsel that has represented Petitioner from the beginning is not now saying that he was ignorant of Petitioner's rights in the Federal forum. Petitioner's stated unwillingness to be a litigant means only that he would have preferred to be left alone by the authorities so that he could continue without interference his highly lucrative activities of furthering illegal gambling.

Petitioner voluntarily chose to begin action in the State courts and he voluntarily remained there as long as possible. 18 *U. S. C.* § 1084(d) became effective September 13, 1961. It was not until December 14, 1961, that the Delaware Public Service Commission initially decided that it could even exercise jurisdiction. Then, and for that matter, at any time from the beginning of this case, Petitioner had a perfect right to apply for a temporary injunction against the threatened discontinuance of his service while he brought his case before a Federal court. This he never elected to do.

The case of *Yager v. Yager*, 7 Cal. 2d 213, 60 P. 2d 422 (1936), relied on by Petitioner (PB 20), has no application here because, *inter alia*, Petitioner did in fact file a supplemental pleading before the Delaware Supreme Court which

asserted the preemptive effects of Federal law. In any event, the *Yager* case which deals with narrow questions regarding the implementation of clearly conflicting California community property law, is not apropos to the case at bar where the fact situation is wholly different and where it is obvious that the new Federal law was fully known to all parties, was clearly before each State court, and was designed, not to preempt, but to aid the pre-existing State procedure.

Nor is the case of *Vassar v. Raines,* 274 F. 2d 369 (10th Cir. 1959), cert. den. 360 U. S. 936 (1959), 362 U. S. 982 (1960), of any aid to Petitioner (PB 22). In *Vassar,* the Court merely affirmed that a State court's interpretation of a charge in a Federal action was correct. The quoted dicta (PB 22) do not have the broad scope implied by Petitioner. Further, the fact situation of the case at bar is completely unrelated to that in *Vassar.*

The case at bar is clearly one for the application of *res judicata* as set forth in *Grubb v. Public Utilities Commission of Ohio,* 281 U. S. 470 (1930); *U. S. v. Silliman,* 167 F. 2d 607 (3d Cir. 1948), cert. den. 335 U. S. 825 (1948); *Kaufman v. Shoenberg,* 154 F. Supp. 64 (D. C. Del. 1954). None of the exceptions to *Grubb* provided by *England v. Louisiana State Board of Med. Exam.,* 375 U. S. 411, 419 (1964), is available to Petitioner.

It is submitted that there are no important and unsettled questions relative to this issue which should be decided by pronouncement of this Court.

CONCLUSION.

It is respectfully submitted, for the reasons discussed above, that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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